Supreme Court, U.S.
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No. (1)

In the

Supreme Court of the United States

MARK A. LESLIE,

Petitioner,

v.

BRUCE JOHNSON, *et al.*,

Respondents

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

Mark A. Leslie, *Pro Se*
76 S. Powell Ave.
Columbus, OH 43204
(614) 274-7620

QUESTIONS PRESENTED

1. Whether the federal court's determination of a state government employee's Free Exercise claim under the First Amendment, which is asserted in the context of such employment, must apply the *ex ante* criteria of Employment Div. v. Smith. or may apply instead the *ex post* balancing test of Pickering v. Board of Education.

2. Whether a government employee's free exercise claim must *prima facie* show as a causation element that the defendant supervisor specifically intended to restrain or prohibit the employee's religious expression or only show that the supervisor's actions had the effect of restricting or burdening such expression. Mt. Healthy City Sch. Dist. v. Doyle.

3. Whether the applicability and neutrality criteria adopted in Employment Div. v. Smith , as interpreted and applied by the federal courts, "faithfully serve the purpose of the Constitution" and "represent the correct understanding of the Free Exercise Clause", or whether this Court should adopt different constitutional criteria for free exercise claims under the First Amendment.

PARTIES TO THIS PROCEEDING

Petitioner:

Mark A. Leslie

Respondents:

Bruce E. Johnson
Douglas A. Garver
Richard V. Everhart
Marlo B. Tannous
Rita R. Parise
Heather L. Cunningham

Counsel of Record for Respondents in the Sixth Circuit Court of Appeals:

Jack W. Decker
Principal Assistant Attorney General
The Attorney General of Ohio
Employment Law Section
150 E. Gay Street, 22nd Flr
Columbus, OH 43215-3167
(614) 644-7257 (PH) (614) 752-4677 (telefax)
elsreview@ag.state.oh.us

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that he has no parent companies or nonwholly owned subsidiaries.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Sixth Circuit Court of Appeals (Appx., *infra,* pp. 1 --7 is unreported; however, the opinion appears at 2007 U.S. App. LEXIS 17775 and at 2007 WL 2052236. The Opinion and Order of the District Court, Southern District of Ohio (Appx., *infra*, pp. 8 -- 62) is unreported; however, the Opinion and Order appears at 2006 U.S. Dist. LEXIS 24064 and at 2006 WL 7457700.

JURISDICTION

The court of appeals' judgment was entered on July18, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1). The jurisdiction of the District Court was invoked under 28 U.S.C. §§1331, 1343(a)(3), and 1343(a)(4) with reference to 42 U.S.C. §1983, 28 U.S.C. §2201(a), and 28 U.S.C. §2202.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the U.S. Constitution provides in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

The Fourteenth Amendment to the U.S. Constitution provides in relevant part:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

A. The Continuing Relevance of Faith

This case raises important questions concerning the protection of expressions and activities of religious faith against government prohibitions and interferences.

In American history the Bible has been and continues to be the primary source for inspiration and guidance for the beliefs and actions of American people of faith. The Bible says that "faith apart from works is dead." James 2:26, American Standard Version. According to this Court, the Constitution says that faith in the form of pure belief cannot be restrained by government but that faith in the form of works can be regulated to "safeguard the peace, good order and comfort of the community." Cantwell v. Connecticut , 310 U.S. 296, 304 (1939) It seems that in Cantwell this Court implicitly accommodated the possibility that religious faith could be regulated into irrelevancy (ie. death) by restricting the works expressing faith. Thus, the relevancy of faith is dependent in large part upon the "good faith" of government leaders and the courts that create, administer, and interpret the laws that regulate works of faith.

B. The Proceedings Below

In it decision below, the Sixth Circuit Court of Appeals stated that the factual background of this case was thoroughly discussed in the district court's opinion and order. The Circuit Court made no reference to the Statement of Facts and Statement of the Case furnished by this Petitioner in his briefs that had highlighted numerous salient facts that had been disregarded by the District Court in its Opinion. Neither did the Circuit Court address any of the six issues submitted to it by this Petitioner for review, including the following: *"IV. The District Court*

erred in deciding that the balancing standards of Pickering v. Bd. of Education apply to Leslie's religious expressions because he was a government employee." and *"V. The District Court erred in deciding that the free exercise standards of Employment Div. v. Smith do not apply to Leslie's religious expressions."* Rather, the Circuit Court upheld the Order granting the Defendants' Motion for Summary Judgment upon causation grounds.

The ruling of the District Court below that is the primary basis for this Petition is that the Pickering[1] balancing test applies to Petitioner's Free Exercise claim[2] instead of the rules of Employment Div. v. Smith and Church of Lukumi Babalu Aye v. City of Hialeah[3].

The facts provided in the District Court's opinion were selectively drawn and interpreted by that Court from the hundreds of pages of transcript of the record hearing held in Petitioner's whistleblower action against the Ohio Department of Development ("ODOD") before an Administrative Law Judge of the Ohio Personnel Board of Review ("OPBR")[4]. The testimony in such administrative hearing was focused primarily upon satisfying the Administrative Law Judge's improper application of the *McDonnell Douglas – Burdine* [5] disparate impact discrimination evidentiary criteria to a retaliatory

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[1] Pickering v. Bd. of Education, 391 U.S. 563 (1968)

[2] "The Pickering balancing test is applicable in this case because the government is acting as the employer and the government's interest in maintaining an efficient workplace exists regardless of whether the employee is trying to exercise his right to free speech or his right to the free exercise of religion." Order and Opinion, Appx. pp. 50-51.

[3] Employment Div. v. Smith, 494 U.S. 872 (1990); Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993)

[4] Mark A. Leslie v. Ohio Dept. of Development,, Case No. 02-WHB-03-0112 Ohio Personnel Board of Review. Defendants submitted a full copy of this transcript to the District Court below; however, the transcript was never delivered to the Sixth Circuit Court.

[5] McDonnell Bouglas Corp. v. Green, 422 U.S. 792 (1973); Texas Dept of Community Affairs v. Burdine, 450 U.S. 248 (1981). *Compare* Burlington Northern & SantaFe Railway Co. v. White, 74 U.S.L.W. 4423 (2006) at pp. 7—12 of the Slip Opinion.

discharge claim arising from whistleblower reports that should have been protected under Ohio Revised Code §124.341.

In Petitioner's appeal of the OPBR's decision dismissing the whistleblower complaint[6], the Common Pleas Court found that Petitioner had presented a *prima facie* case of actions protected by ORC §124.341. However, the Common Pleas Court relied upon several conclusions and characterizations of the District Court's Opinion below to uphold the OPBR's decision on the grounds that Petitioner had "harassed" a female co-worker with communications that were insubordinate to a directive from Petitioner's supervisors. It is these same communications that Petitioner has claimed to be protected expressions of religious faith in all of his State and federal proceedings.

Petitioner appealed the decision of the Common Pleas Court to the Franklin County Court of Appeals[7]. The Court of Appeals determined that the Common Pleas Court had used "harass" in its vernacular sense (ie. pestering, annoying), not in an adjudicative way (e.g., *quid pro quo*, hostile work environment).[8] Nevertheless, the County Court of Appeals upheld the Common Pleas Court's decision because, in the Court's opinion, the Petitioner's discharge was not targeted at his religious communications since the ODOD supervisors had forbidden all non-business communications with Petitioner's female co-worker.[9] The

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[6] Leslie v. Ohio Dept of Development. Case No. 05CVF-05-5501. (Com. Pl. Franklin Cty. OH)

[7] Leslie v. Ohio Dept of Development. Case No. 06AP-628. 2007-Ohio – 1170 (10th Dt. Ct. App. 2007)

[8] The federal District Court below never clarified this vernacular versus adjudicative usage. Neither did the District Court offer any reasoning for its use of the term "harass".

[9] Only the Petitioner had been barred from any form of personal communication directed to the specified female co-worker. Business communications from Petitioner to the female co-worker were exempt from the prohibition. Personal communications initiated by the specified female co-worker to Petitioner were exempt (although, presumably, Petitioner's responses to such communications were prohibited). Personal communications from Petitioner to any other co-

Court concluded that it could not find that ODOD's articulated reason for dismissing Petitioner was unlawful because the religious content of Petitioner's communications was not pertinent to the ODOD supervisors' decision to discharge Petitioner.[10]

Petitioner appealed the decision of the County Court of Appeals to the Ohio Supreme Court[11]. In his Memorandum in Support of Jurisdiction for his discretionary appeal of a substantial constitutional question relating to religious expression, Petitioner argued that his Ohio constitutional liberty of religious expression set forth in Ohio Const. Art. I, §7, which had been expansively interpreted by the Ohio Supreme Court in Humphrey v. Lane, (2000) 89 Ohio St.3d 62,[12] had been violated by his discharge in direct and immediate response to expressions of his religious faith directed to his government co-worker. The Ohio Supreme Court declined jurisdiction of Petitioner's appeal as not involving any substantial constitutional question.[13]

REASONS FOR GRANTING THE PETITION

This case highlights the clash of important constitutional principles in the context of government service – *ie.*, the fundamental, historic liberty of religious

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worker were not restricted. All other co-workers could address personal communications of any type to the specified female co-worker.

[10] This conclusion was contradicted by documentary evidence and direct testimony that had been presented in the OPBR administrative hearing. Portions of this evidence and testimony appear in the Appendix submitted to the Sixth Circuit Court below.

[11] Leslie v. Ohio Dept of Development, Case No. 07-0750. Ohio Sup. Ct. (filed: April 26, 2007)

[12] In Humphrey, the Ohio Supreme Court retained the strict scrutiny analysis for religious exercise claims made under Ohio Const. Article I. §7.

[13] Entry, Case No. 2007-0750. Ohio Sup. Ct., filed July 25, 2007. This entry was filed seven days after the Sixth Circuit Court filed its decision below on July 18, 2007.

expression and the preservation of this liberty *vel non* when a citizen accepts government employment versus a contemporary prioritizing of order and efficiency in government service and in the summary judgment processing of cases involving constitutional liberties. This case identifies various and conflicting procedures that the federal courts are adopting in summary judgment proceedings to determine constitutional protection *vel non* of religious expression by government employees "in balance" with government's efficiency justification.

This case also addresses a constitutional aberrance that prejudices the First Amendment liberty of religious expression for more than 17.4 million State and local government employees, as well as such liberty for more than 2.7 million federal employees.[14] It is an aberrance that prejudices the beneficial influence that religious belief, expression, and action has made and may hereafter make upon the decisions and actions of government officials – at a time when there is a demonstrated and urgent need for ethics and morality in government and public life. This case focuses squarely upon previous Free Exercise decisions that have prompted fervent adverse responses from Congress, State governments, and religious leaders throughout our nation. This case presents to this Court the opportunity to correct an aberrance that only this Court can remedy.

This case highlights the importance of judicially created procedures in preserving substantive constitutional liberties from government infringement.

The decisions of both the District Court and Court of Appeals below and their reasoning of the separate issues addressed in each decision are erroneous.

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[14] Table No. 525. All Governments – Employment and Payroll by Function: 1999: Statistical Abstract of the United States at p. 330.

I. The Questions Presented Are Important to Defining the Place of Religious Belief and Action in American Life and Governance.

a. Works of Faith in the Government Workplace

The First Amendment to the Constitution states a facial presumption that U.S. citizens – state government employees included – will be protected from government interference with their expressions of religious faith. When this federal free exercise liberty was first imposed upon state governments, Cantwell v. Connecticut, 310 U.S. 296 (1939), there was no distinction made between government as employer versus government as sovereign.

When the strict scrutiny constitutional analysis was adopted by this Court for reviewing claims grounded upon this federal and state free exercise liberty, Sherbert v. Verner, 374 U.S. 398 (1963), there was no distinction made between government as employer versus government as sovereign.

When the "least restrictive means" test was added to the strict scrutiny analysis for Free Exercise claims, Thomas v. Review Bd., 450 U.S. 707 (1981), there was no distinction made between government as employer versus government as sovereign.

When this Court replaced the presumption favoring exemptions for works of faith with a presumption favoring the enforcement of facially neutral laws of general applicability, Employment Div. v. Smith, *supra*, there was no distinction made between government as employer versus government as sovereign. The anti-discrimination, rational basis presumption of the Smith decision did not discriminate against works of faith by government employees.

When this Court supplemented the Smith presumption with strict scrutiny review standards for government regulations that were administered in ways that discriminated against works of faith, Church of

Lukumi Bablu Aye v. City of Hialeah, 508 U.S. 520 (1993), there was no distinction made between government as employer versus government as sovereign.

On the contrary, in two cases involving the government as employer or prospective employer, this Court applied free exercise constitutional principles to state governments acting in their capacities as employers. Torcaso v. Watkins, Clerk, 367 U.S. 488 (1961); [15] McDaniel v. Paty, 435 U.S. 618 (1978). [16]

In 1993 Congress enacted the Religious Freedom Restoration Act of 1993 ("RFRA")[17] to reestablish the presumption favoring exemptions for works of faith even from generally applicable. In the original legislation and in the amendment thereto adopted in 2000, there was no distinction made between government as employer versus government as sovereign.

Numerous states responded to this Court's decision in City of Boerne v. Flores, 521 U.S. 507 (1997) by enacting "State RFRAs" to establish a presumption for religious exemptions from their respective state laws or regulations.[18] Ohio's Supreme Court and other state

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[15] Eligibility for public office cannot be conditioned upon religious belief. This Court cited its earlier holding in Wieman v. Updegraff, 344 U.S. 183 (1952): ". . . whether or not an abstract right to public employment exists, Congress could not pass a law providing that no federal employee shall attend mass or take any active part in missionary work"

[16] This Court cited the Sherbert decision in determining that by conditioning the employee's free exercise of his religion upon his surrendering his right to seek public office, the State of Tennessee had unconstitutionally encroached upon the employee's free exercise of religion. 435 U.S. at 626. Ironically, in the case herein submitted to this Court, the ODOD conditioned the employee's continued employment upon his surrender of his exercise of religious expression.

[17] 42 U.S.C. §§ 2000bb to bb-4 (1994)

[18] *See, e.g.*, Ala. Const. Amend No. 622; Ariz. Rev. Stat. §41-1493; Conn Gen. Stat. §52-571b; Fla. Stat. Ch. 761; Idaho Code Title 73, Ch. 4; 775 Ill. Comp. Stat. 35; Mo. Rev State §1.302; N.M. Stat. Ann. §28-22-3; 51 Okla. Stat. §253; 71 Penn Stat. §2401; R.I. Gen Laws §42-80.1; S.C. Code Ann. §1-32-40; Tex Civ. Prac. & Rem. Code Ann. §110.003.

supreme courts adopted strict scrutiny rules that applied even to neutral laws of general applicability.[19] None of these State statutes or court rulings "discriminated" between government as employer versus government as sovereign.

In response to the Boerne decision, Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA")[20], which reinstated the strict scrutiny standard as to religious practices by prisoners in state and federal correctional institutions and as to the enforcement of state or federal land use or zoning regulations that substantially burden religious exercise. This Court upheld RLUIPA against an Establishment Clause challenge in the decision of Cutter v. Wilkinson, 544 U.S. 709 (2005). By this legislation State government as employer is obliged pursuant to a strict scrutiny standard to direct and supervise government employees (e.g., corrections officers) to facilitate certain religious practices of inmates. It is ironic that inmates in State correctional institutions now receive more stringent constitutional consideration for their religious liberty than do the government employees who supervise them. *Compare*, Turner v. Safley, 482 U.S. 78 (1987).

This Court continues to permit accommodation of religious expression without violating the First Amendment in its "modern" Establishment Clause jurisprudence. *See*, Cutter v. Wilkinson, *supra*, (Thomas, concurring in

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[19] *See*,. Humphrey v. Lane (2000) 89 Ohio St.3d 62; Catholic Charities of Sacramento, Inc. v. Superior Court, 32 Cal 4th 527, 10 Cal. Rptr 283 (2004); Fortin v. Roman Catholic Bishop of Portland, 2005 ME 57, 871 A.2d 1208 (2005); Atty Gen. V. Desilets, 418 Mass. 316 (1994); North Carolina v. Carignan, 2006-COA05-825 (Ct App 2005); Shagalow v. State, Dept of Human Resources, 725 N.W.2d 380 (MN 2006); Jeffs v. Stubbs, 970 P.2d 1234 (Utah 1998); Hunt v. Hunt, 162 Vt. 423, 648 A.2d 843 (1994); Ballweg v. Crowder Contracting Co., 247 Va. 205, 440 SE2d 614 (1994); Open Door Baptist v. Clark County, 140 Wn2d 143, 995 P.2d 33 (1999); Wisconsin v. Miller, 202 Wis2d 56, 549 NW2d 235 (1996)

[20] 42 U.S.C. §2000cc

judgment); County of Allegheny v. American Civil Liberties Union, 492 U.S. 573 (1989) (Kennedy, concurring in judgment). It is peculiar that the religious expressions of government employees – even outside working hours and outside the workplace - receive substantially less accommodation from government as employer than these same citizens might receive from government as sovereign. When, as in the case submitted herein, a written invitation from one government employee to a Christian co-worker to assist established Christian ministries becomes a punishable event, any hope for or expectation of even *de minimis* accommodation is nullified.

In 1968 this Court articulated the distinction between government as employer versus government as sovereign into First Amendment jurisprudence. Pickering v. Board of Education, 391 U.S. 563 (1968). *See, also* Connick v. Myers, 461 U.S. 138 (1983), Churchill v. Waters, 511 U.S. 661 (1994). In Pickering this Court adopted and applied the sovereign versus employer distinction to a claim of First Amendment speech – not to religious expression. The constitutional principles originated in *Pickering* were specifically directed toward free and unhindered debate on matters of public importance – the core value of the Free Speech Clause. Pickering, 391 U.S. at p. 573. In Waters, this Court said that First Amendment "speech" may involve verbal tumult, discord, and even offensive utterance as necessary side effects of the process of open debate. 511 U.S at p. 672.

The acknowledgement in Waters of the possibility of tumultuous debate on matters of public concern and the strong statements favoring government order and efficiency over employee speech have not heretofore infiltrated this Court's analysis of Free Exercise claims. On the contrary, in Pickering this Court said that when the fact of employment is only tangentially and insubstantially involved in the subject matter of public speech, the speaker must be viewed more as a member of the general public than as a government employee – ie., that government

must respond as sovereign rather than as employer. Pickering, 391 U.S. at p. 574. [21] More recently, this Court stated that "[e]mployees who make public statements outside the course of performing their official duties retain some possibility of First Amendment protection because that is the kind of activity engaged in by citizens who do not work for the government." Garcetti v. Ceballos, 547 U.S.___, 126 S. Ct. 1951 (2006) (p. 12 of slip opinion). This Court further concluded that First Amendment protection is not extended to public statements made by government employees pursuant to their official duties but that such protection will extend to statements made outside such employment duties. *Id.* at pp. 9, 12 (slip opinion).

In the Waters decision (*See*, 511 U.S. at p. 674) and in the Connick decision (*See*, 461 U.S. at p. 147), this Court clarified that the Pickering test would be applied only to speech upon matters of public concern and not to matters of private concern. If this limitation is enforced to its fullest extent against the religious expression of government employees – which generally have *de minimis* or no relation to the public interest or the government's interests as employer – these works of faith would have no constitutional protection because of this primacy of government efficiency. At worst, the constitutional principle stated in Keyishian v. Bd of Regents, 385 U.S. 589 (1967) and restated in Pickering and all of its progeny would be overturned *de facto* as to all religious expression by government employees – ie., a citizen does in fact surrender his First Amendment liberty of religious expression when he accepts government employment. At best, that liberty would be totally suspended while the

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[21] See, also, Connick, 461 U.S. at p. 157 (Brennan, J., dissenting): "The balancing test articulated in *Pickering* comes into play only when a public employee's speech implicates the governments interest as employer. When public employees engage in expression unrelated to their employment while away from the workplace, their First Amendment rights are, of course, no different from those of the general public."

employee was at work or otherwise directly or indirectly engaged in employment related or affiliated activities.

In light of the contextual differences in content, cost, form, constitutional risks and maxims, tone, and listener response, *See*, Connick, 461 U.S. at pp. 147-48; Waters, 511 U.S. at pp. 668, 671, it is no surprise that this Court has never ruled or suggested that the Pickering test *per se* should be applied to Free Exercise claims by government employees. [22] Accordingly, the Circuit Courts and District Courts have failed to adopt consistent, uniform, reliable procedures for determining the Free Exercise claims of government employees. (*See, infra*). This Court has created and required that certain procedures be followed in order to ensure that First Amendment speech standards are appropriately applied. *See*, Waters, 511 U.S. at p. 669. There is a significant and timely need for this Court to define the procedures and standards that will be applied by the federal courts to the Free Exercise claims of government employees. – especially if this Court remains committed to finding accommodation between the Free Exercise Clause and the Establishment Clause. *See*, Cutter v. Wilkinson, *supra*, Hobbie v. Unemployment Appeals Comm'n of Fla, 480 U.S. 136, 144-145 (1987)

The constitutional aberrance is this: despite the development of a large body of case law principles and state and federal legislation establishing procedural protections for religious expression, and despite the fact that such procedures do not differentiate between state government as sovereign and government as employer, and despite the numerous descriptions by past and present members of this Court of the importance of religious belief, ethics, and

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[22] "The Supreme Court has never identified a legal analysis governing whether an adverse employment action infringes a public employee's right to free exercise of religion. Although we apply a Pickering balancing analysis in the context of public employees and free speech, it is unclear what analysis applies in the context of public employees and free exercise of religion." Brown v. Polk County, 37 F.3d 404, 408 (8th Cir. *en banc* 1994)

works to the founding of our nation[23] and to the integrity of and loyalty to our democratic, representative process of government[24]; nevertheless, the federal courts are discriminating against state government employees by excluding them from the procedural standards of both the religious exemption presumptions and the anti-discrimination presumptions established by such case law and legislation for Free Exercise claims.

This diminution of fundamental religious liberty occurs each time a federal court treats a State employee's Free Exercise claim as a First Amendment speech claim and thereafter bends the eligibility criteria and balancing standards of Pickering, *supra*, Connick, *supra*, and Waters, *supra*, to reject the employee's claims -- rather than applying the standards of Smith, *supra*, or Lukumi Babalu Aye, *supra*. Even though the Pickering line of cases are factually irrelevant to religious expression and the Pickering rules and the explanations thereof do not reasonably align to the varied forms of protected religious expression; nevertheless, the federal courts persist in "shoe-horning" the Free Exercise claims of State government employees into the Pickering analysis. This bending of precedent and reason has occurred because this Court has so prominently prioritized government efficiency (Waters at pp. 674-75) and because this Court has not identified constitutional principles and procedures for balancing the Free Exercise rights of government employed citizens with the government's interest in workplace efficiency and order.[25]

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[23] *e.g.* ". . . religion, morality, and knowledge, being essential to good government and the happiness of mankind . . ." Wallace v. Jaffree, 472 U.S. 38 (1985) (CJ Rehnquist, dissenting). The dissent included this quote from the Northwest Ordinance, 1 Stat. 50, that was enacted by the First Congress prior to the passage of the Bill or Rights.

[24] *See, e.g.* Lynch v. Donnelly, 454 U.S. 668 (1984).

[25] "[W]e believe that the Supreme Court might well adopt, for free exercise cases that arise in the context of public employment, an analysis like the one enunciated in Pickering v. Board of Education (citation omitted). That case dealt with free speech rather than the free

One Court applied the Pickering test merely because the Appellant was a government employee. Baz v. Walters, 782 F. 2d 701 (7th Cir. 1986). One Court assumed "arguendo" that the employee's religious expression touched upon a matter of public concern before applying the Pickering test. Knight v. Connecticut. Dept Public Health, 275 F.3d 156 (2nd Cir 2001). [26] One Court applied the Pickering test after it decided that the test applied to any First Amendment communication by a government employee and that the test best permitted a public employer to navigate safely between Free Exercise Clause and the Establishment Clause. Berry v. Dept of Social Services, 447 F.3d 642 (9th Cir. 2006), *See also*, Brown v. Polk County, Iowa, 37 F.3d 404 (8th cir. 1994). One Court decided that public statements evidencing the religious faith of a government official holding a prestigious office were subject to the Pickering test because those statements were newsworthy. Lumpkin v. Brown, 109 F.3d 1498 (9th Cir. 1997). On rehearing, one Court ignored both the Smith Rule and the Pickering test for government employee Free Exercise claims and created a third test based upon Title VII undue hardship considerations. Brown v. Polk County, Iowa, 61 F.3d 650 (8th Cir *en banc* 1995). In a later decision that same Court ruled that the issue of undue hardship would be decided by applying the Pickering balancing test. Altman v. Minnesota Dept of Corrections, 251 F.3d 1199 (8th Cir. 2001). Later, another Court decided that a government employee's §1983 Free Exercise claim would be analyzed and decided upon the same criteria as a religious discrimination claim under Title VII. Lawson v. Washington, 296 F.3d 799 (9th Cir. 2002). One Court has

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exercise of religion, but because the analogy is such a close one, and because we see no essential relevant differences between those rights, we shall endeavor to apply the principles of Pickering to the case at hand." Brown v. Polk County, 61 F.3d 650 (8th Cir. *en banc* 1995) (emphasis added).

[26] The District Court adopted this rationale in its decision below (Appx pp. 52-53).

finally conceded that a government employee's religious expression is not a matter of public concern and is, therefore, not entitled to evaluation under the Pickering test and not otherwise entitled to First Amendment protection. Daniels v. City of Arlington, Texas, 246 F.3d 500 (5th Cir 2001).

With only occasional exceptions, the federal courts are uniformly determining that, on balance, the state employee's interest in religious expression is outweighed by the State's interest in workplace efficiency, regardless if the employee asserts a religious expression claim in addition to or in lieu of a speech claim [27] *See, e.g.*, Brown v. Polk County, supra; Knight v. Connecticut. Dept Public Health, supra; Berry v. Dept of Social Services, supra; Baz v. Walters, *supra*.

State Attorneys General are re-characterizing religious expression as speech of religious content so that the summary judgment analysis will be shifted to a Pickering balancing test rather than the Free Exercise principles developed by this Court and adopted by the state courts, Congress and the State legislatures. It is ironic that one Court of Appeals expressly denied to a government employee-plaintiff the benefit of the "stricter" analysis of the Smith Rule in favor of the more lenient analysis of the Pickering balancing test. Berry v. Dept of Social Services, *supra* at pp. 648-49.

In the Berry decision and the other decisions adopting the Pickering analysis for Free Exercise claims, the Circuit Courts have made no effort to (i) acknowledge the distinguishing characteristics between speech and religious expression under this Court's First Amendment decisions, (ii) explain how the content of Appellant's religious expressions constituted "matters of public concern", or (iii) explain how the nature of religious

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[27] *But, see*, Tucker v. State of Cal. Dept of Educ., 97 F.3d 1204 (9th Cir 1996) (rule prohibiting religious expression by only one government employee in the workplace during working hours is overbroad unreasonable, and not supported by sufficient state interests)

expression *per se* comports with this Court's description and application of the balancing test in the actual Pickering decision or its description of matters of public concern in Connick v. Myers, *supra*.

In some instances the federal courts justified avoiding the more "stringent" analyses of the Smith rule and the Lukumi corollary by concluding that upholding religious expression pursuant to those rules might result in the State's violating the Establishment Clause. *See*, Berry v. Dept of Social Services, *supra*; Brown v. Polk County, Iowa, 37 F.3d 404 (8th cir. 1994). In other decisions, the court utilized the State's generalized concern with an Establishment Clause violation as the "compelling interest" that "trumps" the employee's constitutional interest in religious expression. *See*, Asselin v. Santa Clara County, 185 F.3d 865 (9th Cir. 1999).

Armed with the conclusions and analyses of these federal court decisions, State government supervisors (such as respondents in this case)[28] are insulated from consequences for burdening or prohibiting religious expression by subordinates inside or outside the workplace and during or after working hours -- *ie*, the same religious expressions that the State as sovereign is obliged to respect. The present case exemplifies the power of the State to intentionally prohibit by means of threats and discipline the historically presumed privilege of one government employee to invite a co-worker to participate in a Christian ministry.

If State supervisors may use the Pickering test to justify the restraint of religious expression by government employees in deference to workplace efficiency, then by logical extension the Federal government should be entitled to use the same Pickering test as a defense against federal

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[28] Bruce Johnson is the former Director of the Ohio Department of Development ("ODOD"). The other defendants were senior officers of ODOD who provided legal and administrative services to the Ohio Housing Finance Agency, which until July 1, 2005, was a State agency serviced by employees of ODOD.

employee claims grounded upon RFRA -- *ie.*, RFRA claims of federal employees are subordinate to the government's defense of workplace efficiency -- either as a matter of procedure under the Pickering analysis or as a per se compelling state interest pursuant to the "significant" interest rule of the Waters decision. In other words, if the efficiency considerations that were prioritized in the Waters decision have constitutional precedence, then the government's "constitutionalized" interest in efficiency should *per se* "trump" the federal employee's rights of religious expression in the government's summary judgment motion, despite the presumption of such rights arising from both the First Amendment and by an Act of Congress (*ie.*, RFRA).

World history reveals that dictatorship and autocratic enforcement of government rules or commands may be a highly efficient form of governance; however, such efficiency invariably subverts the liberties treasured by Americans since the founding of the colonies and the adoption of the Bill of Rights. It can be safely assumed that government supervisors named as defendants in Free Exercise claims will uniformly assert in summary judgment motions this superceding interest in government efficiency. The Summary Judgment Motion and the briefs submitted by the Respondents in this action are a case in point.

Government supervisors should not be permitted to suppress First Amendment liberties with episodic or "prophylactic rules" based upon unsubstantiated claims of possible abuses that might impair administrative efficiency.[29] Religious expression deserves more accountability from government supervisors than any *ex post* efficiency interest that a court might rationally conceive for restricting works of faith. Approving the Pickering balancing test for Free Exercise claims imposes upon government-employed individuals a substantial procedural burden of justifying their acts of faith *ex post*

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[29] United States v. Treasury Employees, 513 U.S. 454 (1995) (O'Connor, J., concurring)

after government supervisors have infringed or threatened such liberties and after government attorneys have opportunity to "rationalize" the supervisors' actions. On the other hand, establishing a procedure for Free Exercise claims that imposes *ex ante* conditions to promulgating and administering restrictions upon religious expression by government supervisors and that recognizes the employees' interest as "citizens of faith" in balance with the government's efficiency concerns will provide the 20,000,000 government employees – including supervisors a national, uniform standard for defining and limiting the boundaries of religious expression that will be protected under our federal Constitution.

b. The Consequence of the Smith Rules to the Liberty of Religious Expression.

Since its inception, the plurality decision in Employment Div. v. Smith, *supra*, has been vigorously criticized – both as to its reasoning and as to its establishing a pro-government presumption of upholding by summary judgment government regulations that Free Exercise claimants cannot sufficiently prove to be discriminatorily targeted at religious practices or motivated by subjective religious animus.[30] For some time this criticism continued unabated from members of this Court[31]

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[30] "In my view, today's holding dramatically departs from well settled First Amendment jurisprudence. . . . and is incompatible with our Nation's fundamental commitment to individual religious liberty." Smith, 494 U.S. at p. 891 (O'Connor, J., concurring)
[I]t effectuates a wholesale overturning of settle law concerning the Religion Clauses of our Constitution. Smith, 494 U.S. at p. 908 (Blackmun, J., dissenting, and joined by Brennan, J., and Marshall, J.)

[31] "I continue to believe that Smith was wrongly decided, because it ignored the value of religious freedom as an affirmative individual liberty, and treated the Free Exercise Clause as no more than an antidiscrimination principle. Church of Lukumi Babalu Aye, 508 U.S. at p. 578 (Blackmun, J. and O'Connor, J., concurring in judgment)
"[W]e are left with a free exercise jurisprudence in tension with itself, a tension that should be addressed and that may legitimately be

and from scholarly commentators.[32] Commentators have noted the confusion and diverging procedural processes in the federal courts as they interpret the criteria and reasoning of the Smith decision.[33] (*See*, description of varying federal court procedures, *infra*) Some commentators are devising "models" of how to interpret and apply the Smith criteria and reasoning to mitigate this confusion and lack of uniformity.[34] Congress and twenty-four states responded with procedures that rejected the pro-government, anti-discrimination presumptions of the Smith decision[35] in favor of the exemption presumptions crafted by this Court in the pre-Smith Free Exercise decisions.

In light of these numerous, continuing, widespread negative responses to the Smith decision, is it time for this Court to reexamine the doctrines, presumptions, and interpretations of the Smith decision and determine

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addressed, by reexamining the Smith rule in the next case that would turn upon its application. Church of Lukumi Babalu Aye, 508 U.S. at p. 564, (Souter, J., concurring in judgment).

"I believe that we should reexamine our holding in Smith . . . . In its place, I would return to a rule that requires government to justify any substantial burden on religiously motivated conduct by a compelling state interest and to impost that burden only by means narrowly tailored to achieve that interest. City of Boerne, 521 U.S. at p. 548 (1997) (O'Connor, J., dissenting); *also*, (Souter, J., dissenting), and (Breyer, J., dissenting).

[32] See, e.g., Michael W. McConnell, Free Exercise Revisionism and the Smith Decision, 57 U. Chi. L. Rev. 1109 (1990); William P. Marshall, In Defense of Smith and Free Exercise Revisionism, 58 U. Chi. L. Rev. 308 (1991); Frederick Mark Gedicks, The Rise and Fall of the Religion Clauses, 6 BYU J. Publ. L. 499 (1992); Douglas Laycock, Summary and Synthesis: The Crisis in Religious Liberty, 60 Geo. Wash. L. Rev. 841 (1992)

[33] "In the wake of Smith, confusion abounds in the lower courts, which interpret the Court's new test in significantly divergent ways." Carol M. Kaplan, The Devil is in the Details: Neutral, Generally Applicable Laws and Exceptions from Smith, 75 N.Y.U. L. Rev. 1045, 1046 (2000)

[34] James M. Oleske, Jr., Undue Burdens and the Free Exercise of Religion: Reworking a "Jurisprudence of Doubt", 85 Geo. L.J. 751 (1997); Carol M. Kaplan, *supra*, footnote 34

[35] *See*, footnotes 18, 19, 20, 21, *supra*.

whether they "faithfully serve the purpose of the Constitution" and "represent the correct understanding of the Free Exercise Clause?" [36] The case submitted herein provides this Court with that long awaited opportunity.

c. Reliable First Amendment Procedures are Important to Preserving Substantive First Amendment Liberties.

In the preservation of First Amendment liberties, judicial procedure is important. This Court has stated that some procedures may "be constitutionally required in proceedings that may penalize protected speech". *See*, Waters, 511 U.S. at p. 669. However, this Court has not transferred wholesale all of the procedures that have been established for proceedings affecting First Amendment speech claims over to proceedings affecting Free Exercise claims. This Court has not specifically transferred the Pickering procedure to the free exercise proceedings of government employees. This Court has not specifically transferred the standards of its equal protection cases to free exercise proceedings.[37]

Neither has this Court transferred the "substantial or motivating factor" causation element of government employee First Amendment speech cases[38] to Free Exercise

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[36] City of Boerne v. Flores, 521 U.S. at pp. 545, 565 (O'Connor, J., dissenting, joined by Breyer, J.)

[37] (*See*, Church of Lukumi Babalu Aye, Section II (A) (2) that was joined by only two justices).

[38] In its opinion below, the Sixth Circuit Court upheld the District Court's dismissal of the Petitioner's remaining Free Exercise claim on the secondary grounds that the Petitioner failed to prove "that the religious content of his expression was a "substantial" or "motivating factor" in [Appellee's] decision to terminate him, a showing that is his burden to establish, and only then the defendant's to rebut". (Appx pp. 5-6) The Sixth Circuit Court stated that an employee must link the speech in question to the defendants' decision to dismiss him. The Court ruled that the Petitioner had not proved that the Appellees "sought to punish him specifically for the religious content of his communications". The Circuit Court required the Petitioner to prove intentional, hostile animus to the religious content of his expression as

proceedings. Grafting such a causation element into Free Exercise jurisprudence would prescribe a subjective animus requirement (ie. targeting religious practices for disfavored treatment) for Free Exercise claims that this Court has thus far avoided. *See*, Church of Lukumi Babalu Aye, Inc., *supra*, (Scalia, concurring in part and concurring in judgment), (Souter, J., concurring in part and concurring in judgment). Members of this Court have noted on various occasions their desire to avoid or minimize judicial "psychoanalysis" of subjective animus as an element of claims based upon the Free Exercise or Speech clauses of the First Amendment. *See, e.g.*, Crawford-el v. Britton, 522 U.S. 574 (1998); Locke v. Davey, 340 U.S. 712 (2004) (Scalia, J. and Thomas, J., dissenting).

Notwithstanding the blurred perception of the Free Exercise Clause by some courts (*See*, footnote 25 *supra*), there are significant differences between the content, purposes, and history of the Free Exercise Clause and the speech clause of the First Amendment. In recent times, however, many federal courts have transformed the Free Exercise liberties of government employees into limited public concern speech in order to facilitate the efficient dismissal of Free Exercise claims. There are no assurances that other First Amendment speech criteria, employment discrimination criteria, or qualified immunity criteria such as "but for" causation[39], alternative motivating rationale[40], mixed motives[41], or pretextual dissembling[42] will not also be incorporated into Free Exercise jurisprudence to uphold the efficient use of a supervisor's censoring powers unless

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part of the causation element of his §1983 Free Exercise claim. *See*, Prater v. City of Burnside, Ky., 289 F.3d 417 (6th Cir. 2002) (Free Exercise claimant must show that the government discriminatory actions intentionally sought to burden religious activities).

[39] *See*, Hartman v. Moore, 547 U.S. 250, 260 (2006)

[40] *See*, Mt. Healthy City Sch Dist Bd of Educ. V. Doyle, 429 U.S. 274, 287 (1977)

[41] *See*, Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)

[42] *See*, Crawford –el v. Britton, 522 U.S. 574 (1998) (Rehnquist, C.J. dissenting)

this Court adopts procedures for Free Exercise claims that are directed toward balancing the government's interest in order and efficiency with the citizen's interest in exercising and defending unabusive religious expression.

II. The Circuits Are Divided Over the Appropriate Procedure for Determining Free Exercise Claims

a. Works of Faith in the Government Workplace

The decisions cited in Subpart a of Section I, *supra*, demonstrate that numerous procedural approaches have been adopted thus far by the Circuit Courts in deciding Free Exercise claims of government employees: (i) The Pickering standards are applied with an assumption that the religious expression is a matter of public concern, Knight v. Connecticut Dept Public Health, *supra* (2nd Cir.); (ii) Title VII undue hardship considerations, Brown v. Polk County, Iowa, *supra* (8th Cir *en banc*), are evaluated using the *Pickering* balancing test, Altman v. Minnesota Dept of Corrections, *supra* (8th Cir.); (iii) the same criteria as a religious discrimination claim under Title VII are applied Lawson v. Washington, *supra* (9th Cir.); and (iv) such religious expression by a government employee is not a matter of public concern and is, therefore, not entitled to First Amendment protection Daniels v. City of Arlington, Texas, *supra* (5th Cir.).

In addition to these inconsistent approaches, four Circuits have ruled upon the Free Exercise claims of government employees by using the "stricter" neutrality and applicability standards of Employment Div. v. Smith, *supra*. *See*, Genas v. State of N.Y. Dept of Correctional Services, 75 F.3d 825 (2nd Cir 1996) (Sabbath observance by corrections officer); Fraternal Order of Police Newark Lodge No. 12 v. City of Newark, 170 F.3d 359 (3d Cir. 1999) (police officer wearing a beard); Booth v. Maryland, 327 F.3d 377 (4th Cir. 2003) (length of correction officer's hair);

Shrum v. City of Coweta, OK., 449 F.3d 1132 (10th Cir. 2006) (Sunday work schedule for a police officer).

It appears that in the Second Circuit Sabbath observance is reviewed under the Smith Free Exercise criteria (Genas, supra); however, verbal communication is reviewed under the Pickering speech criteria (Knight, *supra*). Will this Court abide these divergent swings of judicial procedure for the Free Exercise claims of government employees?

In the preservation of constitutional liberties, judicial procedure is important.[13] The procedure adopted by a federal court will generally *de facto* determine the boundaries of a substantive liberty as well as the respective rights and obligations of the litigants – just as the specified rules of "football" would determine the outcome of a contest between the Washington Redskins and the D.C. United. The respect historically shown by this Court for the role and benefits in American history and governance of constructive works of faith belies any tolerance for a patchwork, *ex post* system of balancing that imposes ponderous evidentiary burdens upon Free Exercise advocates while favoring the government with court-rationalized, unsubstantiated, and generalized concerns for workplace efficiency or individuated sensitivities.

There is a clear and present need for this Court to establish clear, precise, and uniform procedural standards for defining the constitutionally protected boundaries of religious expression by government employees.

b. Uniform Procedures are Important to Preserving Substantive First Amendment Standards for all Citizens.

The Circuit Courts are now implementing the Smith-Lukumi non-discrimination principles in an ever-widening disarray of procedures.

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[13] "We agree that it is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures." Waters, 511 U.S. at p. 669.

The D.C. Circuit Court described the Free Exercise criteria as regulations that target in practical effect religious faith to an extreme degree. American Family Ass'n, Inc. v. F.C.C., 365 F.3d 1156, 1171 (D.C. Cir. 2004). The Court also stated that the "differential impact" of the challenged regulation was not so severe as to create a religious gerrymander. Thus, vocabulary and concepts from equal protection and discriminatory impact jurisprudence are now infiltrating Free Exercise jurisprudence and are opening the door to a variety of new *prima facie* evidence criteria and affirmative defenses.

The First Circuit has applied a "content-based" test: whether the government regulation evinces a content-based animus against religious expression and, therefore, discriminates against a particular religion or religious practice. Knights of Columbus #94 v. Town of Lexington, 272 F.3d 25 (1st Cir 2001). Requiring evidence of subjective intention – or lack thereof - is gaining acceptance in Free Exercise jurisprudence.

The Second Circuit has concluded that the Smith and Lukumi decisions require a determination of whether a law is based on religious animus or has the objective of targeting religious beliefs. Evidence that would support a claim of disparate treatment under the Fair Housing Act (Title VIII) is relevant to this determination. LeBlanc-Sternberg v. Fletcher, 67 F.3d 412 (2nd Cir. 1995). Thus, a Free Exercise claim will require evidence that infers that animus against the religious group or activity was a significant factor in the promulgation or administration of the burdensome regulation.

In Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004), then Judge Alito summarized the teachings of Smith, Lukumi, and two prior decisions of the Third Circuit Court. This summary succinctly sets forth the non-discrimination principles of Smith and Lukumi without supplementing them with vocabulary and concepts from equal protection, Title VII, and other discrimination cases. This summary has not been referenced in any other Circuit

Court decisions. In Brown V. Borough of Mahaffey, Pa., 35 F.3d 846 (3d Cir. 1994), the Court identified the determinative summary judgment issue as whether the defendants intentionally impeded the plaintiffs' religious activity. Thus, the claimant's burden of producing evidence of actual religious animus is playing a determinative role in Free Exercise jurisprudence.

The Fourth Circuit Court of Appeals has considered official action that targets religious conduct for distinctive treatment, government hostility that is masked or overt, and meticulous review of "governmental categories" to eliminate "religious gerrymanders". Booth v. Maryland, 327 F.3d 377 (4th Cir. 2003). In that case the District Court had ruled that a government employee must plead simultaneously a Title VII discrimination claim in order to preserve a First Amendment Free Exercise claim based upon inconsistent enforcement of a facially neutral regulation. The District Court's novel rule was overturned.

The Sixth Circuit Court has ruled that when a Free Exercise claimant challenges a facially neutral law on the basis of its administration, the claimant must show that the government intentionally sought to burden religious activity. Prater v. City of Burnside, Ky., 289 F.3d 417 (6th Cir. 2002). The Court ruled that the claimant must show more than disparate impact in order to prove discriminatory animus toward religion by the government. *Id.* at p. 429. The Court also ruled that "an inference of religious discrimination based upon disparate treatment requires evidence that a party was treated differently from a similarly situated party with a different religious affiliation". *Id* at p. 429. However, the Sixth Circuit Court had previously recognized that Free Exercise neutrality includes neutrality between religion and non-religion. Hartman v. Stone, 68 F.3d 973 (6th Cir. 1995). Thus, if a facially neutral law substantially burdens a religious practice, the Free Exercise claimant must prove with direct evidence that an intentional, discriminatory animus

against the claimant's particular beliefs or practices motivated the burdensome regulation.[44]

The Seventh Circuit Court has ruled that only express or intentional discrimination violates the Free Exercise Clause. Erickson V. Bd. of Gov's St. Colleges & Univ., 207 F.3d 945, 950 (7th Cir. 2000). Inferences of disparate impact have no "constitutional footing" following the Smith decision. *Id.* On the other hand, the Court has stated that the subjective motives of government actors should not be confused with the "object" of a law in a Free Exercise claim because only two Justices approved the portion of the Lukumi decision discussing the motives behind the contested ordinances. Grossbaum v. Indianapolis-Marion County Building Auth., 100 F.3d 1287, Note [3] (7th Cir. 1996). The Court has yet to clarify how the Free Exercise claimant may prove the express, intentional discriminatory object of a burdensome law without also furnishing direct proof of religious animus by the government actors legislating or enforcing the law.

The Seventh Circuit Court has also held that the application of the facial neutrality criteria of the Smith decision to a Title VII accommodation claim will direct the venue of the Title VII action into a State court. Endres v. Indiana State Police, 334 F.3d 18 (7th Cir. 2003). Why must a Free Exercise advocate navigate this procedural labyrinth?

The Eighth Circuit Court has ruled that the Free Exercise protections "pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons, [citations omitted], and it is not violated in the absence of a showing of direct governmental compulsion". Tarsney v. O'Keefe, 225 F.3d 929, 935 (8th Cir. 2000) (emphasis added). This statement appears to require proof of discriminatory intent or religious animus and of government compulsion directly targeted at the

[44] *See*, footnote 38, *supra*, as to the Circuit Court's ruling below.

religious practice or belief. However, the Eighth Circuit has also ruled that

> "in the governmental employment context, the first amendment protects at least as much religious activity as Title VII does. [citations omitted]. Another way of framing that holding is to say that any religious activities of employees that can be accommodated without undue hardship to the governmental employer, see 42 U.S.C. §20003(j), are also protected by the first amendment. In other words, if a governmental employer has violated Title VII, it has also violated the guarantees of the first amendment. Brown v. Polk County, IA, 61 F.3d 650, 654 (8th Cir. 1995).

Although it is not clear, these statements of law appear to be irreconcilable.

The Ninth Circuit Court has ruled that a §1983 Free Exercise claim shall be procedurally determined in accordance with the procedures for establishing a *prima facie* case of religious discrimination claim under Title VII (42 U.S.C. 2000e-2(a)(1). Lawson v. Washington, 296 F.3d 799 (9th Cir. 2002), citing Brown, 61 F.3d 650, supra.

The Tenth Circuit Court has expressly rejected the Eighth Circuit's ruling that the first amendment protects at least as much religious activity as Title VII does. The Tenth Circuit Court ruled that "the religious accommodation requirements of Title VII, 42 U.S.C. §2000e(j), extend beyond the dictates of the Free Exercise Clause, as interpreted by *Smith*." Shrum v. City of Coweta, OKLA., 449 F.3d 1132, 1143 (10th Cir. 2006). However, the Court also ruled that "the Free Exercise Clause is not confined to actions based upon animus." *Id* at p. 1145. On the other hand, the Tenth Circuit Court has also ruled that secular exceptions to a neutral, generally applicable zoning law burdening religious activity do not automatically create a claim for a religious accomodation; and the Court adopted

a fact-specific inquiry to determine whether the challenged rule had been motivated by discriminatory animus or had been administered in a manner discriminatory to religious groups. Grace United Methodist v. City of Cheyenne, 451 F.3d 643 (10th Cir. 2006).

These decisions indicate that the various Circuit Court interpretations and applications of the Smith-Lukumi neutrality and applicability criteria for Free Exercise claims have developed as many exemptions, fact-specific determinations, and lack of uniformity as the strict scrutiny criteria and religious exemption analysis that preceded Smith. Added to this situation will be the Circuit Courts' interpretation and application of this Court's decision in Locke v. Davey, 540 U.S. 712 (2004). This decision adds the "far milder" exception to a State's facial disfavor of religion. Justice Scalia has suggested that this Court may be moving toward a "proof of substantial concrete harm" requirement for Free Exercise claims. *See*, Locke, 540 U.S. at p. 731 (Scalia, J., dissenting). Professor Marci Hamilton concluded that this Court made clear that strict scrutiny will not be applied absent a showing of government's hostility to religion.[45] Does this Court desire to encourage this trend toward "psychoanalysis" in Free Exercise jurisprudence?

Does this state of jurisprudence warrant the reconsideration of the Smith-Lukumi procedural analysis as the optimal means of securing and preserving religious liberties in the manner intended by the First Congress and the first thirteen States and in the manner desired by a significant host of Americans today? The case submitted herein provides the opportunity for such reconsideration.

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[45] "The Supreme Court Issues a Monumental Decision", FindLaw website: http://writ.news.findlaw.com/hamilton/20040227.html. Professor Hamilton also objects to works of faith conducted by members of this Court. "Did the Six Supreme Court Justices Who Chose to Attend the 54th Annual "Red Mass" Exercise Bad Judgment?", FindLaw website: http://writ.news.findlaw.com/hamilton/20071003.html (10/3/2007)

Conclusion.

In our culturally diverse society, the racial, ethnic, and religious composition of our government workforce has changed and continues to evolve. This diversity may provide government supervisors with excuses to suppress works of faith under the guise of ensuring efficiency from disruption caused by styles of dress, practices of prayer, symbols of faith, religious media, or "proselytizing" invitations that they consider offensive. If faith apart from works does eventually die, then the ethics, morality, self-control, altruism, diligence, modesty, humility, self-sacrifice, and other precepts of faith that have influenced government decisions and empowered individual courage throughout America's history may eventually wither and die as well.

The manner in which the "religion clauses" of the First Amendment to the Constitution are interpreted and applied by this Court to preserve unabusive religious expression from *ex ante* intimidation and from interference that is *ex post* rationalized by "government-as-employer" will serve as a harbinger of the respect *vel non* that all Americans of faith may expect from the federal courts when confronting interference with religious expression by "government-as-sovereign".

There is a clear and present need for this Court to establish uniform procedural standards for defining the constitutionally protected boundaries of religious expression. These boundaries should respect the importance of both religious belief and also works of faith in American history and in contemporary American culture and governance. This case presents to this Court the opportunity to fulfill this need.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Mark A. Leslie, Pro Se
76 S. Powell Ave.
Columbus, OH 43204
614-274-7620 (H)
614-975-8800 ©
maleslie@sbcglobal.net

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
No. 06-3527
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
July 18, 2007
Leonard Green, Clerk

MARK A. LESLIE,)
)
Plaintiff-Appellant,)
)
V.) On Appeal from the United States
) District Court for the Southern
BRUCE JOHNSON, ET AL,) District of Ohio
)
Defendants-Appellees.)
)

Before: BOGGS, Chief Judge; CLAY and ROGERS, Circuit Judges.

BOGGS, Chief Judge. Mark A. Leslie, an attorney licensed in Ohio and proceeding pro se, appeals a district court grant of summary judgment in favor of the defendants in his civil rights action filed under 42 U.S.C. 1983[1]. We affirm.

[1] Leslie's original complaint included state law claims that were omitted from his amended complaint. The district court nevertheless addressed those claims, and declined to exercise supplemental jurisdiction over them in light of its resolution of the federal claims

I

The factual background of this case was thoroughly discussed in the district court's opinion and order. In brief, Leslie worked as an in-house attorney for the Ohio Department of Development from July 2000 until his dismissal in March 2002. As of August 22, 2000—after a short period as an intermittent employee—he served as Chief of Compliance, and was responsible for, among other things, reviewing loan programs and particular loan closings for the Ohio Finance Authority, a subsidiary agency of the ODOD. During the course of his employment, he questioned the validity of a number of proposals and transactions, the details of which are irrelevant to his appeal.

Also during the course of his employment, Leslie became separated from his wife, and subsequently began seeking a relationship—beyond his existing professional one—with Karen Banyai, manager of OHFA's Housing Development Loan Program and Housing Development

Assistance Program. There is some dispute as to the exact nature of the interactions, and the clarity with which Banyai initially indicated her lack of interest in a romantic relationship with Leslie. There is, however, no dispute that Leslie persisted, and that after ODOD supervisors and Human Resources officials became aware of the situation, he was told specifically not to have any further personal communications with Banyai. After a brief period of apparent compliance, Leslie again began making overtures, including a call to Banyai's home on Thanksgiving Day, and passing her a note about church-affiliated prisoner outreach programs. He was again warned by his superiors to cease all such contacts. Within a few weeks, however, he had made a further phone call to Banyai's home and given her written materials, including materials from a religious group with which Leslie worked, and a note inviting her to help him and the group develop a spreadsheet for their volunteer directory. After discussions among management, and Leslie's admission that he made the overtures in

question, ODOD's director terminated Leslie for insubordination for his continued unwelcome contact with Banyai.

II

Leslie initially pursued a "whistleblower" First Amendment claim, arguing that his discharge was in retaliation for his speech questioning OHFA loans and programs (some of which had occurred in the period leading up to his dismissal), which, he contends, were matters of public concern. He now concedes, however, in his reply brief, that the Supreme Court's recent decision in *Garcetti v Ceballos*, 1 26 S. Ct. 1 *95* 1 (2006), precludes his federal claim under the First Amendment, inasmuch as it made clear that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline." *Id.* at 1960. There is no question, and Leslie now concedes, that his allegedly whistle blowing

speech was the product of his official duties, which required him to review OHFA practices.

III

Leslie continues to maintain, however, that the communications to Banyai that precipitated his dismissal constituted protected religious expression, and that his dismissal was in retaliation, thus violating his free expression rights under the First Amendment. We review the district court's grant of summary judgment de novo. *Lukowski v. CSX Transp., Inc.*, 416 F.3d 478, 482 (6th Cir. 2005). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law" Fed R Civ P *56(c)*

Leslie has failed to proffer evidence to support a conclusion that the religious content of his expression was a "substantial" or "motivating factor" in ODOD's decision to

terminate him, a showing that is his burden to establish, and only then the defendant's to rebut. *Mt. Healthy City Sch Dist Bd of Educ v Doyle,* 429 U S 274, 287 (1977), *Perry v McGinnis,* 209 F 3d 597, 604 (6th Cir. 2000). Leslie "may not rely on the mere fact that an adverse employment action followed speech that the employer would have liked to prevent. Rather, the employee must link the speech in question to the defendant's decision to dismiss" him. *Bailey v. Floyd County Bd. of Educ ex rel Towler,* 106 F 3d 135, 145 (6th Cir 1997) (internal citations omitted)

In this case, Leslie has failed to present evidence linking the religious aspect of his speech and communications to the ODOD's decision to terminate his employment. The evidence undisputedly shows that Leslie repeatedly harassed Banyai with unwanted, invasive, and personal communications both at her home and at work. The record further shows that Leslie's supervisors made several attempts to get Leslie to cease such communications. Leslie repeatedly ignored those

instructions—as he admits, claiming only that he failed to understand the precise scope of the instructions—and continued to communicate with Banyai on matters only some of which in any way concerned religion. He has offered no evidence to suggest that ODOD would have sought to punish him specifically for the religious content of his communications. Thus, even if Leslie's communications concerning the activities of religious organizations amounted to protected speech—a question we need not reach—there is no basis for a reasonable juror to conclude that it was this speech, rather than Leslie's repeated insubordination and unwelcome contact with Banyai, that motivated his termination.

IV

For the foregoing reasons, the district court's grant of summary judgment in favor of the defendants is AFFIRMED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed: 3/14/2006
Document 43

Mark Leslie,

Plaintiff,

-v-

Case No. 2:04 -CV-OO8O
JUDGE SMITH
Magistrate Judge Kemp

Bruce Johnson, *et al.*,

Defendants.

OPINION AND ORDER

Plaintiff asserts that Defendants violated his First and Fourteenth Amendment rights when they terminated his public employment for allegedly harassing a female co-worker. Both sides move for summary judgment For the reasons that follow, the Court grants Defendants' Motion for Summary Judgment and denies Plaintiff's Motion for Partial Summary Judgment

I. Facts

A. Parties

Plaintiff Mark Leslie is an individual citizen of the State of Ohio. Plaintiff worked as an in-house attorney for the Ohio Department of Development ("ODOD"). ODOD terminated his employment, effective March 1, 2002.

Defendants are Bruce E. Johnson, ODOD's Director; Douglas A. Garver, ODOD's former Assistant Director; Richard V. Everhart, ODOD's former Executive Director of the Ohio Housing Finance Authority ("OHFA"), Mario B Tannous, ODOD's Chief Legal Counsel, Heather L Cunningham, ODOD's former Director of Human Resources, and Rita R Parise, OHFA's Director of Planning, Preservation. All of the individuals are named in their individual capacities only (Am Compl ¶¶ 6 -11)

Plaintiff asserts a 42 U S C §1983 claim for violation of his First and Fourteenth Amendment rights, an O.R.C. § 4112 claim for religious discrimination and retaliation, and a claim for wrongful discharge.

B. State proceedings

After Plaintiff's employment with ODOD was terminated on March 1, 2002, he filed an appeal with the State Personnel Board of Review of Ohio ("SPBR"), claiming to have been fired for "whistle-blowing" activity under O.R.C. § 124.341. (Am. Compl. ¶¶ 39, 45-47). An oral evidentiary hearing was conducted by an Administrative Law Judge ("ALJ") of the SPBR on December 8-10, 29, 2003 and May 17-19, 2004. Testimony and documentary evidence presented to the SPBR are part of the record in the instant case. On May 9, 2005, the SPBR issued a decision upholding the ALJ's decision in favor of ODOD. In its order the SPBR stated:

> Wherefore, it is hereby **ORDERED that** the instant appeal be DISMISSED principally for Appellant's failure to establish *a prima facie* case, pursuant to R.C. 124.03 and R.C. 124.341 and secondarily for Appellant's failure to rebut Appellee's demonstration that Appellant was, indeed, removed due to Appellent's creation and perpetuation of an untenable working environment for co-worker Karen Banyai and due to his insubordination in failing to cease and desist from these actions in the face of clear and repeated

instructions to do so, pursuant to RC 124.03 and RC 124.341

Finally, Leslie has filed a complaint with the Ohio Inspector General and a mandamus action in the Franklin County Court of Appeals, both of which have been dismissed. Am. Compl.¶¶ 38, 40-44). State ex rel. Leslie v. Ohio Housing Finance Agency, 2003-Ohio-6560. 2003 Ohio App. LEXIS 5856 (Franklin Dec. 9, 2003). The Ohio Supreme Court affirmed the dismissal of Leslie's mandamus action, and further held that the attorney-client privilege applies to communications between state agencies and their in-house counsel. State ex rel. Leslie v. Ohio Housing Finance Agency, 105 Ohio St.3d 261, 824 N.E.2d 990 (2005).

C. Employment history

Leslie began work for ODOD as "Chief of Compliance" on August 22, 2000, after having previously worked for thirty days as an intermittent employee. Leslie's

position was in the unclassified service.[2] (Leslie Tr-3, 32; Am. Compl. ¶ 13). Leslie began by assisting ODOD Chief Legal Counsel Marlo Tannous, but his job was quickly transposed to one providing legal services for the Ohio Housing Finance Authority ("OHFA"). For OHFA, Leslie became responsible for developing new loan documents, reviewing existing loan programs and closing loans. His position description, which stated that his job was to "provide a full range of legal advice and services to ODOD," was accurate. (Leslie Tr-2, 106-07; Tr-3, 46-47).

Throughout his career at ODOD, Leslie was directly supervised by and reported to Mario Tannous, ODOD's Chief Legal Counsel and a Deputy Director. (Leslie Tr-2, 112- 13 ; Tr-3 , 39- 41 , 66). He was indirectly supervised by Rita Parise. (Leslie Tr-3, 32-34; Appellant's Ex. 51). Among his peers was Karen Banyai, the Manager of OHFA's Housing Development Loan Program and Housing

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[2] Unclassified employees have no tenure rights under Ohio law. *See* O.R.C. § 124.34; Christophel v. Kukulinsky, 61 F.3d 479 (6th Cir. *1995).* "When a public employee has no property right in continued employment, the employee may be discharged without a hearing or notice." Curby v. Archon, *216 F.3d 549, 555* (6th

Development Assistance Program, where many of ODOD's loans were underwritten. (Leslie Tr-3, 60-62; Banyai Tr-6, 1 1 8).

While an intermittent employee, Leslie referred to Rita Parise of OHFA as "his client." (Leslie Tr-2, 110-11). On January 30, 2002, Leslie wrote, "If my attorney responsibilities run to the Board," then the OHFA board should have reviewed certain loan changes. (Leslie Tr-3, 54-56; Appellant's Ex. 26 at ¶ 1). On March 22, 2002, Leslie wrote Michael Hardesty of the Attorney General's Office, "It was always clear that I was serving as an attorney for OHFA and ODOD" and referred to "my legal opinion as agency counsel." (Leslie Tr-3, 58-59; Appellee's Ex. 17). Leslie stated that his job was to "provide a full range of legal advice and services to ODOD." (Leslie Tr-3, 46-47; Appellant's Ex. 49). "I'm in the legal department. I'm around other attorneys. I am acting as an attorney would act." (Leslie Tr-3, 51 -52). He rendered numerous "opinions

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Cir 2000), *citing* Christophel 61 F 3d at 482, 485

about legal issues." (Leslie Tr-3, 71-72). Regardless of whether or not Plaintiff was an attorney for purposes of privileged communications, he was still performing the basic function of legal counsel for a state agency.

D. Karen Banyai

Leslie avers that his relationship with Karen Banyai was at first "professional" but "pretty casual ". They called each other nicknames such as "Red Bear" and "Marvin the Martian," and Banyai shared some details about her family. (Leslie Tr-6, 30-31). Leslie was an "evangelical Christian," and thought Banyai was interested in his religious views. (Leslie Tr-6, 99-100). Although Banyai is a Christian as well, she recalls little religious discussion with Leslie and had formed few impressions of his beliefs (Banyai Tr-6, 168-69)

According to Banyai, her working relationship with Leslie started out positive, but eventually became "challenging" in that she and Leslie wasted a lot of time trading e-mails in which Leslie used a great deal of

technical jargon or legalese. Banyai found such exchanges to be unproductive. At other times, she believed Leslie was argumentative or uncooperative, creating a "challenging" work relationship. (Banyai Tr-6, 120-21, 162-68). Banyai had just taken over a new program with new staff about the time Leslie was hired, so she needed to have good relationships with her co-workers and keep the lines of communications open in order to meet her new responsibilities - and to avoid trading time-consuming e-mails with Leslie. (Banyai Tr-6, 128-29).

Near the end of May 2001, Leslie started to have marital difficulties, and on August 1, 2001 , his wife moved out of their home. On June 22, 2001, Leslie asked Banyai to accompany him to lunch at First Watch in Columbus, during which he told her of his impending divorce. On the way back to the office, Leslie asked Banyai if he could see her socially. According to Leslie, Banyai was "okay with just being -- I think she used the term buddies," and otherwise wanted to think about it. (Leslie Tr-6, 31-34; *see*

also, Banyai Tr-6, 123-24).

The following weekend Leslie called Banyai at home to ask her to dinner at La Chatelaine in Worthington, Ohio, on Monday, June *25,* 2001 , when Banyai was not scheduled to work.. Banyai viewed the occasion simply as two co-workers getting together, where each drove and paid separately. (Banyai Tr-6, 124). Leslie denies calling Banyai at home and says the dinner date had been arranged at work the preceding week. (Leslie Tr-6, 34).

At La Chatelaine, Leslie again proposed having a social relationship. Banyai responded that they might have lunch together occasionally, but that their relationship could progress no further because Leslie was amidst a divorce. (Banyai Tr-6, 124-25). Leslie recalls having asked Banyai "who loves you" at the La Chatelaine dinner, in connection with having discussed the Walk to Emmaus and the Kairos Ministry, two religious programs in which he was attempting to interest Banyai. (Leslie Tr-6, 33-37). He denies that Banyai told him she was uncomfortable having

a social relationship, and thought Banyai was "contemplating" one because she had not said "no" yet. (Leslie Tr-6, 38).

A week or so later, Leslie entered Banyai's office and again suggested a dating relationship. (Banyai Tr-6, 125-26). A couple of days later, she told Leslie that a social relationship was not in the cards, that she did not date co-workers because of a prior bad experience, and she did not date people in the midst of divorces. (Banyai Tr-6, 126, 162). Leslie protested that a divorce could take "years," but Banyai responded that they remained co-workers anyway, so that a dating relationship remained out of the question. (Banyai Tr-6, 127).

Leslie's recollection is similar, except he conflates the two conversations into one. "But for these two facts [co-worker and divorce], she would have been interested in somebody like me because she had had the opportunity to get to know me through working with me " (Leslie Tr-6, 38-39). Leslie's understanding was that the door was open to

being "buddies" with Banyai, but not to dating. (Leslie Tr-6. 40).

Banyai testified that within a day or so Leslie asked her if she found him attractive. Banyai said she did not know him well enough to respond. Leslie proposed that they find a way for her to get to know him better. Banyai repeated that she did not date co-workers or recent divorcees (Banyai Tr-6, 127) Leslie's recollection of this conversation is again different He recalls that he asked Banyai to "reconsider" her "policy," to which she replied, "are you final yet?" Leslie interpreted this to mean "when will you be available?" (Leslie Tr-6, 40-42)

On September 18, 2001, Leslie sent an e-mail to Banyai's home computer [Appellee's Exs. 11-12]:

> KB: I appreciated your sitting and talking with me today. (sic)Your haircut looks very cute (is that a permissible description for a "mature" woman when she looks nice). As you know, I am biased because I am attracted to you — even with your glasses on that keep sliding down your nose as you push back your thick brown tresses. It looks like your hair is getting darker ... very nice.
>
> As I know, you are very concerned about giving me any

encouragement because of professional and emotional boundaries that you have established and expect me to respect. I admit that I am not doing a good job of respecting them.

Is there a middle ground[7] A set of circumstance where I can enjoy your companionship and begin to find out more about you without disrespecting your concerns and boundaries. I hope so.

I like your smile. I tease you so that I can see you smile — a sincere smile. I like your sincere warm smile . . . very much.

I would like to spend more time together to learn more about the non-professional Karen. Is there a warm, comfortable Karen who isn't focused on accomplishing something . . . A movie Karen . . . a fire in the chimney Karen . . . a cookout Karen . . . a walk in the park Karen . . . a ministry Karen . . . a Karen at worship . . . a campfire and s'mores Karen . . . a Karen who shares scripture and prayer . . . a small fellowship Karen . . . a Karen whose soul radiates a spirit-filled beauty that shines forth from her eyes, her smile, and her dimples? That is a mystery that I would like to explore. I hope that will be possible soon. Any encouragement would be appreciated.

I hope you are taking care of your foot. Walks and talks on crisp autumn Sunday afternoons are good therapy for the soul . . . but not for injured feet.

Peace. Mark

(Appellee Ex. 9). Banyai viewed the e-mail as "extremely personal," "inappropriate" and "creepy." (Banyai, Tr-6, 1 30-

3 1 ; Cunningham *Tr-5, 5* 1). Leslie testified that the September 18, 2001 e-mail was meant to communicate his interest in getting to know Banyai on several levels, "one of which could have led to a romantic relationship." (Leslie Tr-6, 44-46; Appellee's Ex. 9). Banyai did not respond to Leslie's message. (Leslie Tr-6, 46).

At about the same time, Banyai began to receive a number of calls at home from Leslie. She started to screen her home calls and refused to answer if Leslie was the caller. (Banyai, Tr-6, 130-31). Leslie admits making several unanswered calls to Banyai's residence. (Leslie Tr-6, 42-43)

On September 28, 2001 , Leslie sent another e-mail to Banyai's home computer, which stated:

> Hi. Would you please loosen up the boundary just long enough to let me take you to dinner on your birthday? Please??

(Banyai Tr-6, 131 ; Leslie Tr-6, 55-56; Appellee's Ex. 10). In addition, Leslie left a phone message offering to take Banyai out to celebrate her birthday. (Banyai Tr-6, 131). Leslie also says he sent Banyai a birthday card offering to

escort her to dinner on her birthday. (Leslie Tr-6, 55-56).

Banyai was uncertain how to approach Leslie to tell him "no" any more directly than she had already done, because she did not want their work relationship to deteriorate. At work, Banyai was walking on "eggshells." (Banyai Tr-6, 170-72).

Banyai did not believe she was encouraging Leslie's attentions. (Banyai Tr-6, 133). Leslie understood that Banyai was not interested in "dating" but he did not consider a birthday dinner to be "dating." (Leslie Tr-6, 58). Leslie appears to have drawn encouragement from the fact that Banyai merely ignored him, and never directly told Leslie to quit leaving unreturned messages for her at home. (Leslie Tr-6, 56-57). Banyai, on the other hand, recalls that the Monday after the birthday invitation, Leslie said he was getting a "very clear message" "personally" but inquired if he and she were "OK" "professionally." Banyai replied that their professional relationship was satisfactory. (Banyai Tr-6, 133).

In early October 2001, Banyai was facing foot surgery. Leslie offered to help Banyai get around after her surgery and run errands for her. (Leslie Tr-6, 58-60; Banyai Tr-6, 134). Leslie denies having prefaced his offer with "I know you're ignoring me and you really don't like me, but I'd like to help you anyway," but Banyai recalls such an introduction (Leslie Tr-6, 60, Banyai Tr-6, 134). Leslie then he offered to help her Banyai's friend, Suzy Wilson, with whom Banyai had arranged her post-surgical care. Banyai refused this offer as well. (Leslie Tr-6, 58-60; Banyai Tr-6, 134).

Around this same time, Banyai and Leslie were having a disagreement at work. Parise told Banyai to go into Leslie's office, close the door and work it out. Banyai did not feel comfortable doing this, so Banyai told Parise about Leslie's unwelcome advances. Parise offered to take action, but Banyai told her that she thought she had the situation under control. Parise told Banyai to come to her if there were further incidents and suggested that Banyai not

interact with Leslie alone. (Banyai Tr-6, 135-36: Parise Tr-2, 93; Parise Tr-6, 184).

On Sunday, October 5, 2001, Columbus Day Weekend, Banyai was leaving her apartment complex with a friend when she believed she saw Leslie driving into the complex. Banyai returned home immediately to check her apartment for intruders (Banyai Tr-6, 1 36-37). Leslie admits he drove by Banyai's apartment. "It was a bad judgment on my part based upon basically just an impulse that I would go up and see if she would be willing to do one of those friendship activities by taking a walk" (Leslie Tr-6, 60-62). This was upsetting to Banyai because Leslie's unannounced arrival made her feel insecure in her home. She had thought that her professional relationship with Leslie was acceptable and that it was or should have been clear to Leslie that they were not going to have a social relationship. She had said "no" to dating, stopped returning his calls and did not return his e-mails. (Banyai Tr-6, 137-38).

The next working day, Tuesday, October 7, 2001, Banyai confronted Leslie and asked if it had been him she had seen at her apartment complex. Leslie admitted driving by, saying that he wanted to invite Banyai to walk with Leslie and his dog "Katie" at Highbanks Metro Park.. Banyai immediately went to Parise and told her it was time to take the next step. (Leslie Tr-6, 62-63; Banyai Tr-6, 138; Parise Tr-2, 94; Parise Tr-6, 186-87).

Later that same day, Parise summoned Leslie to a meeting with Tannous and Deputy Director of Human Resources Heather Cunningham. (Parise Tr-6, 187). Tannous told Leslie that "no means no with respect to any kind of dating invitations" and "they talked about the fact that they didn't want me to have any kind of personal communication with Ms. Banyai." (Leslie Tr6, 63-64; Parise Tr-2, 94). Parise and Cunningham told Leslie that "you don't call her, you don't e-mail her and you don't go to her house." (Parise Tr-6, 188; Cunningham Tr-5, 51, 58). Leslie was "embarrassed" by his actions and said he understood

their instructions. (Leslie Tr-6, 65; Parise Tr-2, 94; Parise Tr-6, 188). "At that point in time I felt that they told me not to do anything that was of a personal nature with Karen." (Leslie Tr-6, 65-66). Later that day Leslie left a voice mail for Cunningham and Tannous apologizing for his inappropriate conduct and promising that it would never happen again. Cunningham took this message from Leslie to mean that he understood the boundaries established by ODOD regarding Leslie's future contact with Banyai. (Cunningham Tr-5, 97, 101).

Parise advised Banyai of their discussion with Leslie. Everything seemed fine to Banyai for about a month afterwards. She and Leslie might exchange passing questions such as "how was your weekend?" but beyond these commonplace superficialities, there were no real "personal" remarks or inquiries (Banyai Tr-6, 139-40)

On re-direct examination, Leslie claimed that the conversation with Tannous, Parise and Cunningham "created confusion in my mind," because he thought the

direct order given to him was "tied to the event of pulling into the parking lot ". Leslie noted that "personal communications" was undefined. Because Banyai shared the most superficial of one-line pleasantries with him at work, Leslie says he somehow interpreted "no personal communications" to mean it was permissible to telephone Banyai at home on family holidays. (Leslie Tr-6, 96-98). One such remark may have been to ask what Leslie was doing for Thanksgiving. (Leslie Tr-6, 66-67; Banyai Tr-6, 140).

On Thanksgiving Day, Leslie phoned Banyai at home and asked if the call was overstepping his "boundaries." Banyai said yes and hung up. (Leslie Tr-6, 67; Banyai Tr-6, 140, 175). Leslie had just wanted "to talk" because his children had accompanied his ex-wife for the holiday, and Leslie was left at home alone (Leslie Tr-6, 67-68).

Banyai did not report this to Parise because she did not want to jeopardize her work relationship with Leslie. (Banyai Tr-6, 140-41, 175). Leslie, however, volunteered to

Parise that he had slipped up and telephoned Banyai at her home over the Thanksgiving weekend. Leslie also mentioned his Thanksgiving contact with Banyai to Cunningham, who reminded Leslie once more that such contacts with Banyai were forbidden. (Leslie Tr-6, 68-69, 103-04; Parise Tr-6, 190-91).

On January 4, 2002, Leslie delivered copies of a *Columbus Dispatch* article about a prison outreach effort that provided Holiday cookies to prisoners. One copy was intended for Parise, the other for Banyai. Although he denies doing so, Leslie apparently placed Parise's copy in Banyai's box and vice versa. (Leslie Tr-6, 71-73; Banyai Tr-6, 143-45; Parise Tr-6, 192; Appellee's Exs. 11-12). The handwritten message at the bottom of the copy intended for Banyai mentioned a religious program to teach computer skills to pre-release inmates. "What is needed is volunteers to teach. Know anybody with a warm heart with computer skills they are willing to teach to others? If you do please have them contact me." [Appellee's Ex. 12]. Although he

admits these articles were clearly not work-related. Leslie "didn't consider this to be dating. I didn't consider this to be anything that even approached a personal relationship " (Leslie Tr-6, 71-73).

Parise did not object to religious nature of the article, but rather to Leslie's apparent disregard for management's instructions to leave Banyai alone (Parise Tr-6, 195). Parise thought the "warm heart" comment, along with the invitation to contact Leslie, clearly crossed the "line" because of their personal nature. She quickly instructed Leslie to stop these sorts of contacts. (Leslie Tr-6, 73-74: Banyai Tr-6, 145-46) . Parise warned Leslie that if he did something like this again, she would do something about it, meaning she would recommend disciplinary action. (Parise Tr-6, 195).

Between January 24, 2002, and February 4, 2002, within less than three weeks of Parise's warning, Leslie suddenly took it upon himself to "discover" and write memos about four new alleged violations of law in the way

OHFA customarily did business. Many of these "violations" had happened months earlier, or had happened many times before. Leslie claims that "I didn't go looking for [violations] . . . I basically disclosed what I was seeing in the course of working on loan transactions." (Leslie Tr-3, 161-62).

Around Valentine's Day, Leslie asked Banyai if he might send her a religious Valentine She said "no," and warned Leslie that such communications could get him in trouble. (Banyai Tr-6, 146) Leslie does not remember whether this incident occurred (Leslie Tr-6, 76)

Within a couple of days, Leslie asked Banyai if she would go to lunch with him and another co-worker. Banyai again refused, and again cautioned Leslie that he was not to contact her on a social basis. Leslie asked Banyai to "think about it," but Banyai was not interested. (Banyai Tr-6, 146, 178). Banyai did not know how to make it clearer to Leslie that she did not want to have anything to do with him on a personal basis. (Banyai Tr-6, 147).

Leslie *still* claims to have been confused as to what was required of him. All that he acknowledges he "understood was that Rita didn't like the reference to a person with a warm heart because there was still non-work related communication that would occur from time to time with Karen just in the course of interacting." (Leslie Tr-6, 74-75).

Cunningham recalls having had three separate meetings with Leslie regarding his contacts with Banyai. (Cunningham Tr-5, 51).

Shortly after Valentine's Day, Banyai received a telephone call at home from Leslie. Leslie claimed he wanted to discuss "projects" with Banyai. After Banyai objected to being called at home, Leslie asked to discuss these apparently urgent matters at work.. Banyai, who was under the impression the projects must be work-related, agreed. (Banyai Tr-6, 147). Leslie acknowledges that the call happened and that Banyai told him (again) not to call her at home, but claims he told Banyai that he had

"personal information" for her. (Leslie Tr-6, 78-79). The point, apparently, is that irrespective of the instructions Leslie had received from Tannous, Parise and Cunningham, Banyai was otherwise permitted to undo this order by somehow "consenting" in some way to receiving "personal" information.

The following week, Leslie either handed Banyai a packet of information or left it in her mailbox. This included another invitation to participate in one of Leslie's religious projects by providing computer support to "Bethlehem on Broad Street," and materials on how to create a will. (Banyai Tr-6, 148 ; Leslie Tr-6, 80; Appellee' s Ex. 13). While admitting that these materials were not work~related, Leslie characterizes his telephone call and "gifts" to Banyai as "sort of an impulse decision on my part" and a "kind gesture." (Leslie Tr-6, 80-81). But by this time the ever mounting non-work related communication from Leslie -- religious or otherwise -- was causing Banyai distress (Banyai Tr-6, 179).

Banayi found Leslie's behavior to be unsettling, worried about Leslie reappearing at her apartment, and did not want to answer her home telephone. Banyai did not want to be so confrontational with Leslie that it would ruin their work relationship and prevent her from obtaining legal advice necessary to move projects forward (Banyai Tr-6, 148-50) Nonetheless, Banyai showed the materials to Parise. (Parise Tr-6, 197). Banyai then met with Cunningham and told her that she was feeling intimidated by Leslie's continued advances to the point that she was on the verge of seeking a restraining order. (Cunningham Tr-5, 41).

Throughout this sorry tale, Leslie blames the "victim" for "encouraging" him by demonstrating even the slightest civility, from which he inferred ambiguity or even interest. "It gets a little blurry because . . . it's hard to understand if [Banyai] talks about things in the office [with others] in my presence and then . . . I provide her with information about things that don't really involve me" such

as the will-making kit." (Leslie Tr-6, 82). Leslie claimed that what his managers had really prohibited was overtures about "dating or romance," not about other "personal" matters, and that "I could do some communication that was strictly on a friendship level that had nothing to do with romance [or] dating, and basically involved religious topics." (Leslie Tr-6, 81, 82-83). Leslie didn't think any of the directions he had been given prohibited religious proselytizing "because I felt that that would have been illegal and I know that Marlo wouldn't have ordered me to do something illegal." (Leslie Tr-6, 115-16).

Leslie may or may not have been fixated upon Banyai's every action, but if he was "confused," it was only because he had ignored everything that Tannous, Parise and Cunningham had been telling him for almost five months. According to his own testimony:

- After his Columbus Day weekend visit to Banyai's apartment complex, Leslie was told to have no

"personal communications" with her. (Leslie Tr-6. 63-64. 65-66);

- After Thanksgiving, Cunningham told Leslie that calling Banyai at home just to "talk" was inappropriate. (Leslie Tr-6. 68-69); and
- In early January. Parise told Leslie that strikingly similar "friendship" and "religious" overtures about a "warm heart" and prison ministries were highly inappropriate (Leslie Tr-6. 73-74)

On February 19. 2002, Tannous. Parise and Cunningham met with Leslie and asked him two questions. Cunningham asked whether he had contacted Banyai at home over the weekend. Leslie admitted he had. but asserted he could properly do so because the call was not on working time. The second was whether Leslie gave Appellee's Ex. 13 to Banyai. Again. Leslie admitted this was the case. (Leslie Tr-3. 163-64; Tannous Tr-4. 171; Parise Tr-6. 197).

Tannous and Cunningham then meet with Garver

and Everhart, explained that Leslie had yet again disobeyed their clear directions to have no further non-work contact with Banyai. They considered ODOD's history of very low tolerance with this type of unwanted harassment and suggested that a recommendation be made to the Director that Leslie's employment be terminated for insubordination and because of the potential liability for ODOD should Leslie persist in his unwelcome pursuit of Banyai (Tannous Tr-4, 173, 175, 180, Garver Tr-7, 52) During this meeting, none of the participants discussed Leslie's criticisms or written memoranda criticizing OHFA's programs or business practices (Tannous Tr-4, 175)

Cunningham, Tannous, and Garver then met with Director Bruce Johnson and made the consensus recommendation to the Director that Leslie be removed for insubordination. (Cunningham Tr-5, 48, Johnson Tr-6, 21) Director Johnson made the decision to terminate Leslie's employment based upon Leslie's insubordination and his continued unwelcome contact with Banyai The Director

was not even aware that Leslie had raised claims that some OHFA practices were illegal (Johnson Tr-6, 21).

The next meeting, with Tannous, Cunningham, and Assistant Director Bruce Velt occurred on March 1, 2002. Leslie was offered the opportunity to resign in exchange for a two-week extension of his employment, but he declined (Cunningham Tr-5, 86-88, Leslie Tr-3, 31, 34-35, Tr-6, 85, Appellant's Ex 56). Cunningham told Leslie that "we have decided to go in a different direction ". No other explanation was given. Leslie was then presented with a letter of removal. (Leslie Tr-3, 28-30; Appellant's Ex. 57).

Leslie's harassment of Banyai did not end with his removal. Incredibly, Leslie left voice mail and e-mail messages asking Banyai for a job reference -- as if Banyai might be inclined to recommend his employment. He sent a bizarre and disturbing greeting card to Banyai' s home "forgiving" her for a multitude of misdeeds for which Banyai undoubtedly did not feel in need of forgiveness, along with Kairos religious information (Leslie Tr-6, 85-89,

Banyai Tr-6, 151-53, Appellee's Exs. 14, 14A). Without her permission, Leslie gave Banyai's name as a "kind-hearted person" (again) to the "Bethlehem on Broad Street Church," with which Leslie was affiliated but Banyai had no dealings, in the expectation that the church would contact Banyai — which it did (Leslie Tr-6, 90-91 , Banyai Tr-6, 1 53-54, Appellee's Ex 15) Leslie transmitted a long series of unsolicited religious e-mails to Banyai at home (Leslie Tr-6, 89, 91-92, Banyai Tr-6, 154; Appellant's Exs. 61 , 62, 63, 64). Finally, Leslie sent Banyai an Easter card. (Banyai Tr-6, 154-55; Appellee's Ex. 21).

Banyai did not respond to these communications in any way, except to report them to ODOD (Leslie Tr-6, 93). She was extremely upset but the communications she had received after Leslie's termination, and was at a loss at how to get him to stop harassing her. (Banyai Tr6, 156). She did not want a religious or any other kind of relationship with Leslie and thought she had made that clear. (Banyai Tr-6, 156).

Leslie claims he was still "confused" even after his termination (Leslie Tr-6, 94-95). He thought Banyai had "acted in a way that resulted in my termination," but "I still was willing to consider her a person that I could relate to in Christ even though I wouldn't be relating to her in any other fashion." (Leslie Tr-6, 93).

E. Leslie's Alleged Whistleblowing

Ohio Revised Code § 124 341, known as Ohio's whistleblower statute, contains a prohibition against taking disciplinary action against either a classified or unclassified employee for reporting violations of statutes, rules, or regulations, or the misuse of public resources which the employee has become aware of in the course of his employment. Plaintiff claims that he blew the whistle concerning five areas of activities 1) Equity Bridge loans, 2) the West Tech loan, 3) Seed Money loans to Victoria Place Limited Partnership, 4) the HOME Investment Partnership Act loan to Woda Colonial Park; and *5)* collateralization of a

Compensating Balance loan in relation to Oak Hill Bank.[3] Leslie asserts that Defendants terminated his employment in retaliation for five sets of memoranda he wrote regarding the aforementioned loan issues Plaintiff prepared these memos in August and September 2000, and January and February 2002, questioning what he alleged to be wrongdoing at ODOD Plaintiff claims that he was fired in violation of his free speech rights under the First Amendment (Am Compl ¶¶ 16, 20-24, 50).

Plaintiff filed the instant action on January 30, 2004, asserting that his discharge violated his First and Fourteenth Amendment rights to freely exercise his religion and freely associate with others. Plaintiff also asserts an 0 RC § 4112 claim for religious discrimination and retaliation, and a claim for wrongful discharge. (Am. Compl.¶¶ 19, 27, 33-35, 51-52).

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[3] Each of these alleged whistle blowing activities is discussed in detail in the ALJ's Report and Recommendation and adopted by the SPBR's Order. The SPBR held that Plaintiff failed to establish a causal connection between his reporting and/or whistle blowing and his removal. The Court has found that collateral estoppel bars Plaintiff from raising those same claims again in this Court and therefore it is not necessary to address the details of these claims in this Order

II. Summary Judgment

The standard governing summary judgment is set forth in Fed. R. Civ. P. 56(c), which provides:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law

Summary judgment will not lie if the dispute about a material fact is genuine; "that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v Liberty Lobby Inc , 477 U S 242, 248 (1986). Summary judgment is appropriate, however, if the opposing party fails to make a showing sufficient to establish the existence of an element essential to that party's case and on which that party will bear the burden of proof at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986); see; Matsushita Electric Industrial Co Ltd v Zenith Radio Corp, 475 U S 574, 588 (1986)

When reviewing a summary judgment motion, the

Court must draw all reasonable inferences in favor of the nonmoving party, and must refrain from making credibility determinations or weighing the evidence. Reeves v Sanderson Plumbing Prods Inc , 530 U.S. 133, 150-51 (2000).[4] The Court disregards all evidence favorable to the moving party that the jury would not be not required to believe. Id. Stated otherwise, the Court must credit evidence favoring the nonmoving party as well as evidence favorable to the moving party that is uncontroverted or unimpeached, if it comes from disinterested witnesses. Id.

The Sixth Circuit Court of Appeals has recognized that Liberty Lobby, Celotex, and Matsushita have effected "a decided change in summary judgment practice," ushering in a "new era" in summary judgments. Street v J

[4] Reeves involved a motion for judgment as a matter of law made during the course of a trial under Fed R Civ P 50 rather than a pretrial summary judgment under Fed R Civ P 56. Nonetheless, standards applied to both kinds of motions are substantially the same One notable difference, however, is that in ruling on a motion for judgment as a matter of law, the Court, having already heard the evidence admitted in the trial, views the entire record. Reeves, 530 U S at 150. In contrast, in ruling on a summary judgment motion the Court will not have heard all of the evidence and accordingly the non-moving party has the duty to point out those portions of the paper record upon which it relies in asserting a genuine issue of material fact, and the court need not comb the paper record for the benefit of the nonmoving party In re Morris 260 F 3d 654, 665 (6th Cir 2001). As such, Reeves did not announce a new standard of review for summary judgment motions

C Bradford & Co., 886 F 2d 1472, 1476 (6th Cir 1989). The court in Street identified a number of important principles applicable in new era summary judgment practice. For example, complex cases and cases involving state of mind issues are not necessarily inappropriate for summary judgment. Id. at 1479.

Additionally, in responding to a summary judgment motion, the nonmoving party "cannot rely on the hope that the trier of fact will disbelieve the movant's denial of a disputed fact, but must 'present affirmative evidence in order to defeat a properly supported motion for summary judgment' " *(quoting* Liberty Lobby, 477 U S at 257*)* The nonmoving party must adduce more than a scintilla of evidence to overcome the summary judgment motion. Id. It is not sufficient for the nonmoving party to merely "show that there is some metaphysical doubt as to the material facts." Id. *(quoting* Matsushita, 475 U.S. at 586).

Moreover, "[t]he trial court no longer has a duty to search the entire record to establish that it is bereft of a

genuine issue of material fact." Id at 1479-80. That is. the nonmoving party has an affirmative duty to direct the court's attention to those specific portions of the record upon which it seeks to rely to create a genuine issue of material fact. In re Moms, 260 F 3d 654, 665 (6'"Cir 2001)

III. Discussion

A. Plaintiff's Free Speech/Whistleblower Claim

Defendants argue that Plaintiff's claim that he was terminated in violation of his free speech rights under the First and Fourteenth Amendment ("whistleblower claim") is barred by collateral estoppel. Collateral estoppel "prevents a party from relitigating issues of fact or law which were necessarily decided by a previous final judgment." Smith v. Sushka, 117 F.3d 965, 969 (6th Cir 1997). The Full Faith and Credit Clause requires that Ohio law be applied to determine the preclusive effect of the decision of an Ohio judicial or quasi-judicial body in a federal action. Id. Hapgood v. City of Warren, 127 F.3d 490, 493 (6th Cir. 1997).

Ohio law gives issue and claim preclusive effect to "those administrative proceedings which are 'of a judicial nature and where the parties have had an ample opportunity to litigate the issues involved in the proceeding " Set Products Inc v Bainbridge Twp Bd of Zoning Appeals, 31 Ohio St.3d 260, 262 (1987). Proceedings before the SPBR are manifestly quasi-judicial in nature, and the Sixth Circuit has given issue preclusive effect to the SPBR's resolution of factual disputes in Smith v. Sushka, 117 F.3d at 969.

According to the court in Smith, Ohio law requires that the "identical issue was actually litigated, directly determined, and essential to the judgment of the prior action."Id. at 969. The test set forth in Smith in determining the identity of issues involves:

> a consideration of the evidence presented in support of each. If the same facts or evidence would sustain both, the two actions are considered the same within the rule that the judgment in the former is a bar to the subsequent action. If, however, the two actions rest upon different sets of facts, or if different proofs would be required to sustain the two actions, a judgment in one is no

bar to the maintenance of the other....

Id., *quoting* Monahan v. Eagle Pitcher Indus., 21 Ohio App.3d 179 (1984).

While Plaintiff may actually be arguing two separate claims, one pursuant to ORC § 124.341 and the other pursuant to 42 U.S.C. §1983, each share the common element that the retaliatory action must have been motivated by Plaintiff's "whistle-blowing" speech. The evidence Plaintiff used before the SPBR is the same evidence being set forth in this case. Essentially the same record has been established before the SPBR and now before this Court, relying on the same testimony and exhibits. The SPBR not only held that Plaintiff failed to establish *a prima facie* case pursuant to 0 RC §124.03 and 124.341, but that he was discharged for his harassment of Ms Banyai despite repeated warnings to stop. Therefore, Plaintiff is barred from relitigating the issue of whether his termination was the result of his "whistle-blowing" speech.

Collateral estoppel applies in this case to all Defendants, despite the fact that they were not all named

in the proceeding before the SPBR. The rule that mutuality of parties is a requisite to collateral estoppel is relaxed in appropriate cases. Goodson v. McConough Power Equip, Inc., 2 Ohio St.3d 19 (1983). The Goodson court explained that "under those facts where it was shown that the party defendant clearly had his day in court on the specific issue brought into litigation within the later proceeding, the nonparty plaintiff could rely upon the doctrine of collateral estoppel to preclude the relitigation of that specific issue." Id. at 200-01 . Therefore, regardless of the parties named in each action or in what capacity they are named, Plaintiff had the opportunity to litigate the motivation of the ODOD, which includes the actions of the individuals making the determinations, and therefore is bound by the decision in the SPBR appeal.

Plaintiff argues that the decision of the SPBR cannot preclude him from raising the same issues before this Court because he has appealed the decision to the common pleas court and may further appeal to the state appellate courts.

Plaintiff asserts "[i]t is simply too soon for this Court to make procedural preclusions of the merits of Plaintiff's claims in this Action in reliance upon State administrative rulings that are subject to reversal by the common pleas court or the State appellate courts." (P1's Response to Defs' Supp. Mem. at 3). While it is true that the SPBR's decision has been appealed and is subject to modification and/or reversal, that does not mean that issue preclusion is not applicable in this case The *Restatement of Judgments 2d* (1982), § 13, states

> The rules of *res judicata* are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished form merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.

Defendants correctly point out that Ohio law on this point is sparse, but do direct the Court to Wilkins V. Jakeway, 993 F.Supp. 635, 645-46 (S.D.Ohio 1998). In Wilkins, the Court held that a decision by another branch of the Court was preclusive as to a second action before the Court, even

though the appeal of the first action had not been resolved. Id. The Court therefore finds that the decision by the administrative judge, which was ultimately affirmed by the SPBR is sufficiently firm to be accorded conclusive effect in accordance with the aforementioned Restatement.

Even if Plaintiff were not barred by collateral estoppel from asserting his claims relating to the whistleblower issues, the speech contained in those memoranda would not be related to matters of public concern and therefore would not constitute a constitutional violation. Plaintiff, in his memos, was merely raising general questions about the manner in which OHFA operated. Plaintiff was merely expressing concern over documentation of a loan program and questioning whether the Board was informed of a modification in another program. In Rodgers v. Banks, 344 F.3d 587, 598 (6th Cir. 2003), the Court explained that while whether public offices are operated in accordance with the law is generally a matter of public concern, not all statements about office

operations relate to matters of public concern under Connick. Plaintiff's speech is much like that in Thomson v. Scheid, 977 F.2d 1017 (6th Cir. 1992), in which a fraud investigator's communications about whether fraud by another county official were to be investigated were not protected. The Court held the speech did not involve a matter of public concern because his point was to merely raise questions about the procedure or manner in which the investigation was to be conducted. *Id.* Plaintiff's speech in this case, therefore, does not involve a matter of public concern. Plaintiff does not assert that his employer is violating specific laws, but he was merely expressing his concern over procedural matters.

B Plaintiffs Free Exercise of Religion Claim

Plaintiff alleges Defendants violated his First and Fourteenth Amendment rights when he was terminated. Defendants, however, argue that Plaintiff was not terminated for exercising constitutionally protected speech, but rather because he was harassing a female co-worker.

Defendants also argue that they are entitled to qualified immunity.

> The First Amendment provides as follows
>
> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press, or the right of people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I. Plaintiff contends that Defendants violated his right to free exercise of his religion, and his right to free speech.[5] Plaintiff and Defendants each argue that a different standard should govern the analysis of Plaintiff's claims. Plaintiff proposes that the standard set forth in Employment Division v Smith, 494 U S 872 (1990), which involved a free exercise of religion claim where the government was acting as sovereign, should be applied in this case Defendants, however, correctly argue that the standard set forth in Pickering v. Board of Education, 391 U S 563 (1 968). The Pickering balancing test is applicable in this case because the government is acting as the

employer and the government's interest in maintaining an efficient workplace exists regardless of whether the employee is trying to exercise his right to free speech or his right to the free exercise of religion. Therefore, considering the Pickering balancing test can and has been applied to any First Amendment claim, including a mixed claim of the right to free speech and free religious expression. the Court will apply the test to the case at bar. *See* Collins v Voinovich, 150 F 3d 575 (6th Cir 1998), Monks v Marlinga, 923 F 2d 423 (6th Cir 1991), Cummings v Kilroy, 908 F Supp 507 (SD Ohio 1995)

When a public employee, like the Plaintiff in this case, alleges that he was terminated for engaging in freedom of speech that is protected, the Court must consider three elements. First, the speech must be constitutionally protected. Bloch v Ribar, 1 *56* F 3d 673, 678 (6th Cir 1998). Speech is protected if it is on a subject of public concern Connick v Myers, 461 U S 138, 143 (1983).

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[5] Plaintiff has apparently abandoned his claim that Defendants violated his right to association

Second, the Court must decide whether the "interest of the employee as a citizen, in commenting on matters of public concern, outweighs the employer' s interest in promoting the efficiency of the public services it performs through its employees " Pickering, 391 U S at 568. Third, the Court must consider whether there was an adverse action that constitutes an injury that would likely chill a person of ordinary firmness from engaging in the protected activity and whether plaintiff's speech was a substantial or motivating factor in the employer's adverse action. Bloch, 1 56 F 3d at 678

Plaintiff's speech and other communications in this case consisted of telephone calls to a co-worker, Ms. Banyai, both at work and at her home, leaving voicemail messages, sending her emails, leaving religious materials in her workplace mailbox, and visiting Ms. Banyai's home. Defendants seem to concede that Plaintiff's speech involved a matter of public concern in stating that "[a]lthough expressions of personal religious faith, or religious

solicitations do not fit neatly under *Connick*, most courts assume *arguendo* that such expressions are of "public concern.". Defs' Mot for Summ. J. at 49. In Knight v State of Connecticut Dep't of Public Health, 275 F 3d 156, 164 (2nd Cir 2001), the Court stated that most cases involving expressions of religious faith turn on whether the speech was disruptive under Pickering.

After finding that Plaintiff's speech involved a matter a public concern, the Court must now apply the Pickering balancing test to determine if the employee's free speech interests outweigh the efficiency interests of the government as an employer. 391 U.S. at *568*. If the balancing test weighs in favor of Plaintiff, establishing that the his speech was protected, then the Court will turn to the final element.

While the Pickering court declined to "attempt to lay down a general standard against which all such statement may be judged," it has identified some factors that are indicative of a disruptive work environment and would

justify a restriction on speech. *Id.* at *569*. For example, courts should determine whether the speech tends to disrupt "the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning," or whether the speech implicated the maintenance of "discipline by immediate supervisors." *Id* at 570. The Sixth Circuit has also set forth similar guidelines:

> In order to justify a restriction on speech of public concern by a public employee, plaintiffs speech must impair discipline by superiors, have a detrimental impact on close working relationships, undermine a legitimate goal or mission of the employer, impede the performance of the speaker's duties, or impair harmony among co-workers.

Brandenburg v. Housing Authority of Irvine, *253* F.3d 891, 899 (6th Cir. 2001).

The Court in Waters v. Churchill, 511 U.S. 661, 673 (1994), gives deference to the employer's reasonable prediction of disruption, stating:

> [W]e have consistently given greater deference to government predictions of harm used to justify restriction of employee speech than to predictions of harm used to justify restriction on the speech of the public at large. Few of the

> examples we have discussed involved tangible, present interference with the agency's operation The danger in them is mostly speculative. . . . [W]e have given substantial weight to government employers' reasonable predictions of disruption, even when the speech involved is on a matter of public concern, and even though when the government is acting as sovereign our review of legislative predictions of harm is considerably less deferential.

Accordingly, "the government need not 'allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." Jackson v. Leighton, 168 F.3d 903, 910 (6th Cir. 1999). "When someone who is paid a salary so that she will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to retrain her" Waters v Churchill, 511 U S 661 , 675 (1994)

Plaintiff, in this case, was hired and paid a salary to provide timely and accurate legal advice to ODOD. However, over the course of Plaintiffs employment, he was

warned repeatedly about his contact and actions toward his coworker, Ms. Banyai. Considering the need for Plaintiff and Ms. Banyai to work closely together and Plaintiff's failure to abide by his supervisors instructions, he was disrupting the office and ultimately the effective operation of ODOD. Therefore, Defendants were justified in placing restrictions on Plaintiffs speech because of the disruption it caused.

Plaintiff argues that he could not have subjected Ms Banyai to religious harassment since she claims to be a Christian too. Not only is there no caselaw to support such an argument, but it ignores Ms. Banyai's testimony that the religious communications from Plaintiff were just as unwelcome as the romantic communications. Applying the Pickering balancing test, Plaintiffs free speech interests do not outweigh the government's interest having an efficient workplace. Plaintiff's interest in continuing to communicate with an unwilling listener, Ms Banyai, about religious or mixed religious and romantic issues is limited

at best. However, Defendants' interest in preventing harassment of its employees is great. Defendants are entitled to take action against harassment before it rises to a level that would be actionable by the victim.[6]

Even if the Pickering balancing test weighed in favor of Plaintiff, Plaintiff's alleged protected speech was not a substantial or motivating factor in his termination. It is clear from the facts and Plaintiff's own admissions that he was harassing his co-worker. Ms Banyai. Despite being warned, Plaintiff's disruptive conduct continued and Defendants were forced to terminate Plaintiff's employment. Therefore, Plaintiff was terminated because he was harassing a coworker, not because he engaged in protected speech. Further, Defendants' warnings to Plaintiff were just that, warnings to quit harassing Ms. Banyai. ODOD essentially forbade Plaintiff from having any non-business-related contact with Ms Banyai. While

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[6] The standard set forth in Title VII cases is that the employer should act before the harassment becomes so severe and pervasive that it has actually altered the victim's working conditions. *See* Faragher v. City of Boca Raton, 524 US 775, 805-06 (1998)

Plaintiff may think this restriction was only applied to him. it was essentially ODOD enforcing its policy against harassment. Defendants. therefore, were not placing any restrictions or limitations on Plaintiffs religious speech. but rather. his harassing speech and conduct

C. Qualified Immunity

In addition to asserting that they did not violate any of Plaintiff's constitutional rights. the Defendants also assert that they are entitled to qualified immunity from Plaintiffs First Amendment claim because Plaintiff has failed to demonstrate a violation of clearly established law in her Complaint. The doctrine of qualified immunity shields government officials from liability. as well as from suit, as long as their official conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known". Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). To determine whether a state actor is entitled to qualified immunity. this Court must apply the following two-step analysis. First.

determine whether the plaintiff has demonstrated the violation of a constitutionally protected right. Second, examine "whether the right is so 'clearly established' that a reasonable official would understand that what he is doing violates that right " Brennan v Township of Northville, 78 F 3d 1152, 1154 (6thCir 1996)

1. Constitutional Violation

The threshold question is whether plaintiff's allegations establish a constitutional violation. Hope v Pelzer, 536 U S 730 (2002). Plaintiff has alleged that Defendants violated his right to free speech and the free exercise of religion under the First Amendment, The Court, however, has already analyzed whether Plaintiff has sufficiently alleged that Defendants violated his constitutional rights above. After concluding that Plaintiff has failed to allege a constitutional violation, Defendants are entitled to qualified immunity.

2. Clearly Established Constitutional Rights

Even if Plaintiff were to have sufficiently alleged a

constitutional violation, he could not prove that the violation was of a clearly established statutory or constitutional right. Harlow, *457* U.S. at 818. A right is clearly established if a reasonable official would understanc that what he is doing violates that right. *Id.*

Plaintiff cannot point to a decision that held that an employer was not justified in terminating an employee who was harassing another employee. In fact, Plaintiff failed to cite any relevant caselaw clearly establishing any of his theories or claims. A reasonable government employer, like Defendants in this case, would have terminated an employee for harassing another employee to prevent any Title VII repercussions. Therefore, Defendants are entitled to qualified immunity on Plaintiff's claims against them

D Plaintiffs Fourteenth Amendment Claim

Plaintiffs Fourteenth Amendment claim is predicated on his First Amendment claims. Even if Plaintiff had asserted separate constitutional claims in his Amended Complaint, he has failed to establish any constitutional

violations committed by Defendants. Therefore. Defendants are entitled to summary judgment on all Plaintiff's constitutional claims.

E. Plaintiff's State Law Claims

Plaintiff's initial complaint contained state law claims, however, they were omitted from his amended complaint Nonetheless. the Court declines to exercise supplemental jurisdiction

over Plaintiff's state law claims because it has granted Defendants' Motion for Summary Judgment on all Plaintiff's federal claims. It is well settled that a District Court may decline to exercise supplemental jurisdiction over statelaw claims once it has dismissed all claims over which it possessed original jurisdiction. Saglioccolo v Eagle Ins. Co , 1 12 F 3d 226, 233 (6th Cir. 1997). Indeed, the Sixth Circuit has recognized that if all federal claims are dismissed before trial. remaining state claims generally should be dismissed. *Id.*; Taylor v. First of Am. Bank--Wayne. 973 F 2d 1284. 1287 (6th Cir 1992) Therefore.

pursuant to 28 U S C §1367(c)(3) and (d), the Court will dismiss Plaintiff's state law claims against Defendants without prejudice.

IV. Disposition

Based on the above, the Court GRANTS Defendants' Motion for Summary Judgment (Doc. 10), and DENIES Plaintiff's Motion for Partial Summary Judgment (Doc. 30)

The Clerk shall enter final judgment in favor of Defendants, and against Plaintiff, dismissing this action in its entirety with prejudice

The Clerk shall remove this case from the Court's pending cases and motions lists.

The Clerk shall remove Does. 10 and 30 from the Court's pending motions list.

IT IS SO ORDERED.

/s/ George C Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT